# Supreme Court of the United States,

## OCTOBER TERM, 1895.

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No. 284.

WILLIAM GRAY BROOKS, ADMINISTRATOR, ET AL.,

PLAINTIFFS IN ERROR,

v.

ROBERT CODMAN, ADMINISTRATOR, ET AL.

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## ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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## BRIEF FOR PLAINTIFFS IN ERROR,

**Alfred Bowditch, Adm'r, Lucia G. Alexander, Elizabeth H. Swett, Lucia G. Swett, Mary C. Swett, William L. Swett, Samuel Swett, Charlotte B. W. Hallowell, and Elizabeth G. French.**

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### I.

### STATEMENT OF FACTS.

William Gray, as administrator *de bonis non* with the will annexed of the estate of William Gray, who died in 1825, and was a sufferer from the French spoliations, filed his bill in equity in the Supreme Judicial Court of Massachusetts for instructions as to the disposition of a fund of $122,983.03

which had been paid to him under chapter 540 of the acts of the second session of the Fifty-First Congress, approved March 3, 1891. (26 Stat. 861.)

The single question with which the brief deals is the construction of that act.

The case was heard by a single justice of the Supreme Judicial Court of Massachusetts, and reported by him to the full court, and, pursuant to a rescript from that court, a final decree was entered, by which it was adjudged that the funds in the hands of the complainant should be "paid over as assets of the estate of William Gray the elder, and as passing under his will to the residuary legatees named therein." (Record, p. 32.)

William Gray the elder died in 1825, leaving five sons and one daughter. By his will he gave $100,000 to each of his sons, and $100,000 and a house to his daughter, and he made his five sons his residuary legatees. (Record, pp. 20, 21.)

Two of his sons died testate and without issue. Of the remaining three sons and the daughter there are descendants still living.

See Genealogical Table between pages 6 and 7 of the Record.

The result is that, if the property is to be treated as assets of William Gray's estate, it goes to the representatives of his residuary legatees, and the representatives of his daughter Lucia get nothing. If it goes to his next of kin, to be ascertained at his death, then the administrator of the daughter gets one sixth. If the next of kin are to be ascertained at the date of the passage of the act and according to the statute of distributions, then the living descendants of the daughter get one fourth. This one fourth part divided among such

descendants *per stirpes*, gives to three of them one sixteenth part each, and to five of them one eightieth part each.

See Genealogical Table, at page 6.

This brief is filed in behalf of the administrator and descendants of the daughter Lucia, who, under the decree of the state court, get nothing, since she was not a residuary legatee under her father's will.

In behalf of the descendants of Lucia, we contend that the fund in question should be distributed among the next of kin of William Gray, to be ascertained, at the date of the passage of the act, the issue of the deceased children taking, by right of representation, the shares of their parents, according to the statute of distributions.

In behalf of Alfred Bowditch, as administrator of the estate of Lucia, we submit, as an alternative claim, that the fund is to be distributed among the representatives of the next of kin, to be ascertained, at the death of William Gray the elder.

The descendants of Henry Gray, a son of William Gray the elder, are cut off by the decision of the state court in consequence of an assignment made by Henry Gray to his brothers, and they have therefore joined us in suing out this writ of error. But they are represented by their own counsel, and with that branch of the case this brief has nothing to do.

## II.

### Errors Assigned.

On behalf of Lucia G. Alexander and the other descendants of Lucia Gray Swett:

"That the court, in the interpretation and construction of section 4 of chapter 540 of the acts of Congress of

March 3, 1891, ruled, adjudged, and decreed that the money held by Robert Codman as administrator be paid over, as assets of the estate of William Gray the elder, to the residuary legatees of said William Gray or their representatives, to the exclusion of the plaintiffs in error; whereas these plaintiffs claim that, as next of kin of said William Gray the elder, they are entitled to one fourth part of said money, as follows: —

"The said Lucia G. Alexander, Charlotte B. W. Hallowell, and Elizabeth G. French to one sixteenth part each, and the said Elizabeth H. Swett, Lucia G. Swett, Mary C. Swett, William L. Swett, and Samuel Swett to one eightieth part each; and that the court should have so adjudged." (Record, p. 35.)

In behalf of Alfred Bowditch, administrator of the estate of Lucia Gray Swett:

"That the court, in the interpretation and construction of section 4 of chapter 540 of the acts of Congress of March 3, 1891, ruled, adjudged, and decreed that the money held by Robert Codman as administrator be paid over, as assets of the estate of William Gray the elder, to the residuary legatees of said William Gray or their representatives, to the exclusion of the plaintiff in error; whereas this plaintiff claims that, as administrator of the estate of Lucia Gray Swett, a daughter of said William Gray the elder, he is entitled to one sixth part of said money, and that the court should have so adjudged." (Record, pp. 34, 35.)

## III.

### Argument upon the Law.

The material parts of the act of 1891 are as follows: —

"Be it enacted . . . that the following sums be, and

the same are hereby, appropriated out of any money in the treasury not otherwise appropriated. . . .

"Section 4. To pay the findings of the Court of Claims on the following claims for indemnity for spoliations by the French prior to July 31, 1801, under the act entitled 'An act to provide for the ascertainment of claims of American citizens for spoliations committed by the French prior to the 31st day of July, 1801,' namely, . . .

"On the schooner 'Industry,' Joseph J. Knapp master, namely, William Gray, administrator *de bonis non* of William Gray, Jr., $5882.67."

(And follow many other items in similar form.)

"*Provided*, that in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represents [*sic*] the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

26 Stat. 897, 908, c. 540, sec. 4.

The case turns upon the construction to be put upon this proviso.

1.

*The History and Validity of the French Spoliation Claims.*

In deciding the question whether Congress intended that

the fund appropriated and paid upon the spoliation claims should be distributed amongst the next of kin of the original sufferers, it has been thought material to examine into the history and validity of the claims themselves. The argument is that, if the claims were valid and legal claims, and so recognized by Congress, that would be a ground for holding that the money paid thereon must be treated as assets of the estate of the original sufferer, to be distributed as such. But in this historical inquiry it is important not to overlook the fact that the question is, after all, what Congress intended, and that the best evidence of that intention is to be found in the language of the act. The principal events leading up to that act may be stated as follows: —

1. The claims arose from the depredations of French cruisers upon our commerce, and from the judgments of French prize courts, and could have been enforced against France only by our government, either by diplomacy or by war.

2. In the negotiations leading up to the treaty of 1800, these claims were presented by our commissioners, and France, in turn, presented claims against this country for violation of treaties. By that treaty all claims for indemnity were mutually renounced.

8 Stat. 178, 194.

3. Since the ratification of the treaty, the sufferers by the French spoliations have constantly contended that an obligation of indemnity rested upon our government. Many committees of Congress have reported in their favor, but nothing has been accomplished until the present time.

4. In 1885, Congress directed the Court of Claims to "examine and determine the validity and amount of all the

claims included within the description above mentioned, together with their present ownership, and, if by assignee, the date of the assignment, with the consideration paid therefor," and to "report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor;" with the proviso that "such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimant or Congress." 23 Stat. 283, c. 25.

5. Under this reference the Court of Claims found, with regard to the several claims presented, that the original sufferer had a valid claim to indemnity upon the French government prior to the ratification of the convention between the United States and the French republic, concluded on the 30th day of September, 1800, and that the claim was relinquished to France by the government of the United States by said treaty, in part consideration of the relinquishment of certain national claims of France against the United States, and that William Gray, administrator, as the legal owner of the claims involved in the present case, was entitled to receive from the United States the sum assessed as damages.

The opinions by which the conclusions of the court are explained and supported cover nearly one hundred pages.

*Gray* v. *United States*, 21 Court of Claims, 343–407.

*Holbrook* v. *United States*, 21 Court of Claims, 435–443.

*Cushing* v. *United States*, 22 Court of Claims, 28–57.

It is impossible to extract from them a very satisfactory answer to the precise objections which were urged in behalf of the United States to the validity of the claims, or any

clear notion of the weight of the moral obligation which, in the opinion of the court, rested upon our government.

It has been stated in former arguments that the Court of Claims found the claims to be valid, "having all the features of legal claims, except what they lacked by reason of the inherent difficulty of suing the government."

This is an inaccurate statement, as appears by the following quotation: —

> "So far as we have yet seen, no one of the spoliation claims would have the slightest pretence of a successful result were the investigation to be measured by the standard set for us in other cases."
>
> *Cushing* v. *United States*, 22 Court of Claims, 29.

And again, —

> "The obligations of the government are so far moral and political that they cannot be gauged by the fixed rules of municipal law for the measure of legal damages."
>
> *Buchanan* v. *United States*, 24 Court of Claims, 82.

The court states its conclusion as follows: —

> "We have carefully re-examined the question in the light of the reargument, and nevertheless adhere to the conclusions reached last term, after exhaustive discussion by counsel, and patient and laborious investigation by ourselves, that these claims as a class were valid obligations from France to the United States; that the latter surrendered them to France for a valuable consideration,

benefiting the nation, and that this use of the claims raised an obligation, founded upon right and upon the Constitution (which forbids the taking of private property for public use without compensation) to compensate the individual sufferers for the losses sustained by them."

*Cushing* v. *United States*, 22 Court of Claims, 31.

The Court of Claims was directed to report not only upon the validity but upon the present ownership of the claims. The manner in which it discharged that duty is stated in its opinion in *Buchanan* v. *United States*, 24 Court of Claims, 80, 81, 82:

"The youngest of these claims are now more than eighty-eight years old. The original claimants were merchants, ship owners, underwriters, partners in trade, joint-stock associations, and incorporated insurance companies. Only three of the original claimants have thus far appeared, and they, it is needless to say, are bodies corporate. The individuals who lost by French spoliations were generally men of mature years. Some transferred their claims. Others became insolvent and their assets passed to assignees in bankruptcy, or became subject to the operation of divers state insolvent laws. Some bequeathed their claims by will. Some died intestate of them. All have long since passed away.

"Those claims which passed to assignees in bankruptcy have not remained in the hands of living witnesses, for those assignees have died, and their claims have passed to their administrators, who have in many cases likewise died, and such claims have again changed

hands and passed to the administrators of the administrators. . . .

"A majority of the incorporated companies have likewise ceased to exist, and their claims are in the hands of receivers either for the benefit of creditors or of stockholders. Then, again, many, if not all, of such creditors and stockholders have died or become insolvent, and their interests have passed into the hands of other administrators and assignees in bankruptcy.

"Into this labyrinth of unknown and unascertainable rights and equities the court has not attempted to enter. What it has endeavored to do is to ascertain the person in whom the legal title and custody exist; that is to say, the legal representative who in an ordinary suit at law or proceeding in equity would be deemed the proper party to maintain an action for the recovery of similar assets of the original claimants. In the cases of individual owners or underwriters, the court has required a present claimant to file his letters of administration, and prove to the satisfaction of the court that the decedent whose estate he has administered was the same person who suffered loss through the capture of a vessel. . . .

"In cases of partnership the court has required evidence of survivorship, and has allowed only the administrator of the survivor to prosecute the claim.

"In cases of bankruptcy it has held, under the decisions of the Supreme Court, that the claim passed to the assignee, and that on his death it passed to his administrator. . . .

"And where the evidence has shown the bankrupt estate to be still unsettled, the court has held the legal title to be still vested in the assignee.

"In cases of incorporated companies no longer in ex-

istence, the court has required only the decree of a court of competent jurisdiction, transferring their rights of action to the hands of a receiver. . . .

"In none of these cases has the court assumed to determine who were the next of kin of a deceased claimant; nor whether there are any; nor in what proportion were the several interests of partnership owners; nor whether creditors or descendants have the superior equity; nor whether the children of a bankrupt are entitled to a residue of his estate; nor whether the receiver of a defunct corporation represents creditors or stockholders. In other words, the court has not assumed to determine what persons are legally or equitably entitled to receive the money which Congress may hereafter appropriate for the discharge of these claims.

"When the validity of a claim against France, and the relinquishment thereof by the United States under the second article of the treaty of 1800, and the amount in which the original claimant suffered loss, have been determined and reported, Congress will be in possession of all the facts which this court under its present restricted jurisdiction can possibly furnish. It will then be within the legislative discretion, —

"First, to ascertain through the proper committees who are the persons who should receive the money; or

"Second, to provide for the ascertainment of that fact by additional legislation; or

"Third, to confide the money to the administrators and receivers, who, with the exception of a few still existing corporations, constitute the present claimants, trusting that they and the courts of which they are officers and agents will distribute the funds among the creditors or next of kin of the original claimants.

"The decisions in these spoliation cases are not judgments which judicially fix the rights of any person; and the obligations of the government are so far moral and political that they cannot be gauged by the fixed rules of municipal law for the measure of legal damages.

"When the validity of a claim as against France, and the amount of the losses which an American citizen suffered by her privateers, have been determined, the court can render no further assistance to the legislative branch of the government, and it will still remain the duty of Congress to determine two things: first, the measure of the indemnity for which the United States should be held responsible; second, the persons who are equitably entitled to receive it."

It was after these decisions that the act of 1891 was passed.

The bill as originally prepared pursuant to the findings of the Court of Claims contained appropriations in favor of assignees in bankruptcy, but all such appropriations were stricken out before the bill was enacted.

H. R. 12,571, 50th Cong. 2d Sess.

In *Henry, Adm'r*, v. *United States*, 27 Court of Claims, 142, the court said (p. 145), —

"Among the claimants were several assignees, or representatives of assignees, of original sufferers who had been declared bankrupts, and the court reported in those cases that the assignees, or representatives of the assignees, were entitled to receive from the United States the sum found to be the amount of the losses.

> "In Congress, an appropriation bill was drawn and printed, containing appropriations for all the persons named in the reports of the Court of Claims. From that bill were stricken out all appropriations to assignees in bankruptcy, so far as their representative character appeared in the language of the act. This is a decided indication that Congress did not intend to pay assignees in bankruptcy."

It appears also that about fifty awards were made by the Court of Claims in favor of insurance companies and the receivers of such companies, and that of these only two, in favor of "John Stewart, Receiver of the Baltimore Insurance Co.," were retained in the bill as it was enacted.

> H. R. 12,571, 50th Cong. 2d Sess. pp. 95 *et seq.*
> 26 Stat. pp. 905, 907.

So much for the history of the act of 1891, chapter 540, section 4. On the one hand, it must be conceded that Congress, by the act of 1885, so far recognized a right of property in the claims against France as to call for their present ownership, whether by assignment or otherwise. On the other hand, it appears that Congress, when its attention was drawn by the findings of the Court of Claims to the fact that the present legal owners of the claims were in some cases assignees in bankruptcy, deliberately and expressly refused, in that case at least, to allow the direction of its bounty to be determined by the legal ownership of the claim.

No one can doubt the power of Congress to declare that the next of kin shall stand in place of the original sufferers in every case, regardless of the question of the legal title to the assets of the ancestor's estate.

Mr. Justice FIELD, in *Heard* v. *Sturgis*, 146 Mass. 553, referring to the Alabama claims, said, —

> "The money awarded under the act of June 23, 1874, or under that of June 5, 1882, was perhaps, in a strict legal sense, a gift by the United States, because the United States were under no legal obligation to pay the money received from Great Britain to any one. . . . But governments often recognize obligations towards each other, or towards their own citizens, or towards the citizens or subjects of foreign states, which are analogous to the obligations enforced in judicial courts between litigants. To what extent they will do this, when they will follow, and when depart from, the rules which prevail in judicial courts, is in the discretion of the sovereign power, and in the case at bar it must be determined from the acts of Congress whether the money thereby appropriated was intended as a gratuity, or as compensation for services rendered, or for money paid, or for property lost, taken, or destroyed."

In *Burnand* v. *Rodocanachi*, L.R. 7 App. Cas. 333, Lord SELBORNE, L.C., referring to the act of Congress by which insurance companies were excluded from participation in the Alabama awards, said (p. 336), —

> "Whatever views of moral obligation may be entertained with regard to the act of Congress, I think it is correctly described by BRETT, L.J., as an act of pure gift from the American Government."

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Lord WATSON said (p. 343), —

> "Legal obligation is out of the question, but we have heard something about moral obligation. I do not at

all understand what that means. I think that this fund was entirely at the disposal of the legislature of the United States, and that it was an act of grace on their part to assign it, and give it either to one or the other of the losers by the acts of the 'Alabama,' and that, in giving it as they have done, they were attaching a condition to the gift, which condition was not only entirely within their power, but which they might attach without violating any legal responsibility or moral obligation."

Mr. Justice LAMAR, in *United States* v. *Weld*, 127 U.S. 51, 56, said, —

"It is not necessary to discuss whether, in the absence of any action by Congress as to the distribution of this fund, there could have been any legal or equitable right in any person or corporation to any portion of it. The fact that the Congress of the United States undertook to dispose of this fund and to administer upon it in accordance with its own conceptions of justice and equity, precludes, at least for the purposes of this decision, judicial inquiry into such questions."

It cannot be contended that the claims of our citizens against our government in the matter of the French spoliations were stronger or better than in the case of the Alabama award. But Congress, in distributing the money paid by Great Britain under that award, expressly excluded the claims of insurance companies, whose claims upon every legal ground were as valid as any, while it included the claims for war premiums, although these had been expressly withdrawn from the consideration of the Geneva tribunal.

18 Stat. 248, c. 459, sec. 12.

22 Stat. 98, c. 195, sec. 5.
*Heard* v. *Sturgis*, 146 Mass. 545, 549.

No one would contend that it was unjust or unreasonable for Congress, in attempting to discharge the equitable obligation which rested upon the government because of events which had occurred nearly a century before, to declare that the next of kin should be deemed to represent the original sufferers, regardless of any question of legal title. If creditors were to come in at all, it might be, in case of successive insolvencies, wholly impracticable to follow out the equities in accordance with the legal right. The laws of different states might vary as to the testamentary powers of the deceased. They might contain more or less stringent provisions limiting those powers; for example, as to cutting off or providing for a widow or offspring, or with regard to charitable bequests, or the creation or duration of trusts. The legislators might well have considered that claims of such a nature as these, which the act made actual and real, would in case of testamentary disposition pass under any residuary bequest, and yet might very probably not have been taken into account by the testator in the distribution of his estate made by his will. In 1828 William Gray's executors estimated these and all other claims on European governments, having a face value of $645,000 at $1000 (Record, pp. 45, 46). They might well have come to the conclusion that, as each state would have provided by general legislation, according to the opinion of its own people and with reference to its own customs, what should be the devolution of property in case of intestacy, that would be the most fair and expedient rule for it to adopt in distributing a fund which it could not in any one case now place

within the control and disposition of the original claimant with power now to exercise his will over it. What wiser method, after having secured the fund against creditors, than to say that it should go as it would in ordinary process of law have gone if not interfered with?

The wisdom of such a course is exemplified by thousands of wills in which the testator, after elaborating more or less minutely the trusts by which his estate is limited, provides that, at the period of failure or expiration of all his trusts, the estate shall go to such persons, in such shares, as the same would be distributed under the laws of his domicile if he had then died possessed thereof intestate.

2.

*Congress intended the Fund for the Next of Kin.*

Coming now to the language of the act, we find an express direction that, where the original sufferers were "adjudicated bankrupts, the award shall be made on behalf of the next of kin instead of the assignees in bankruptcy, and that the awards in the case of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives in whose behalf the award is made represents the next of kin."

We submit that it is impossible to give any consistent interpretation to this act which shall not admit the next of kin as beneficiaries in every case.

(*a*) The reason for singling out the case of bankruptcy in the first clause is explained by the statements of the court in —

*Buchanan* v. *United States*, 24 Court of Claims, 74, 81.

*Henry, Adm'r*, v. *United States*, 27 Court of Claims, 142.

In the single case of bankruptcy, the assignee was the person in whose favor the award was made by the court. In all other cases the administrator or executor represented the claimant. There was an obvious absurdity in allowing the award to stand in favor of the assignee, if the creditors were to have no interest in the fund. There was no impropriety in allowing the administrator of the original sufferer to represent the next of kin, if that was the intention of the act.

Is it not clear that creditors of the original sufferers were in all cases to be excluded? In one case a man goes into bankruptcy, and in the other he dies, not having gone into bankruptcy in his lifetime, and his estate is represented insolvent. Shall the creditors be cut off in the one case and not in the other? If they are cut off in both cases it is clear that the administrator cannot take this fund as a part of the general assets to be administrated as such, for in such case it must first be used to satisfy the debts of the deceased.

It has been contended that these claims are not new assets within the meaning of the statute which provides that, "when assets come to the hands of an executor or administrator after the expiration of two years from the time of his giving bond," they shall be subject to the claims of creditors.

Mass. Pub. Sts. 136, sec. 11.

But these claims were not collectible until Congress saw

fit to appropriate the money; and they were not in fact collected for sixty-five years after the death of the original claimant. They were not like valid obligations which are not collectible simply because they have not matured. These claims would never mature. It was wholly within the discretion of Congress to recognize them or to ignore them.

In sundry cases the Massachusetts court has held that new collections are new assets, although the claims were in fact legally enforceable when the first administrator was appointed. *A fortiori*, would this be so held with regard to claims which were not so enforceable.

*Holland* v. *Cruft*, 20 Pick. 321.
*Chase* v. *Redding*, 13 Gray, 418.
*Welsh* v. *Welsh*, 105 Mass. 229.
*Brackett* v. *Williams*, 110 Mass. 549, 551.
*Glines* v. *Weeks*, 137 Mass. 547.

It may be assumed that the legislation of other states has in some form provided that, so long as debts of a decedent remain unpaid, the assets which come into his estate will in some way be applied to their payment.

If, then, the manifest intent of the act is to interfere with the ordinary rule under which an executor or an administrator administers, the question arises how far such interference is intended to extend.

The only limitation made expressly by the act is to the next of kin. In case of bankruptcy "the awards shall be made on behalf of the next of kin." There can be no reason why bankruptcy, the assignee being barred, should divert the devolution of the property into another channel than that which it would have taken without bankruptcy. Upon what ground should the award be paid to the original sufferer's

next of kin in the one case and to his residuary legatee in the other, according as he had or had not been declared a bankrupt before his death? The evident meaning of the clause is, in case of bankruptcy the award shall be made as it would be if the claimant were not bankrupt, viz., "on behalf of the next of kin."

(*b*) The Court of Claims must certify that the personal representative in whose behalf the award is made represents the next of kin. The court cannot so certify unless the personal representative does in fact represent the next of kin, and he cannot represent the next of kin unless it is made his duty by this act to take and pay over the money as their agent or trustee.

It is to be noticed that this very act contains many appropriations in favor of administrators with the will annexed. These *never* represent the next of kin by virtue of their appointment as such, but, like executors, take and hold by their very office adversely to the next of kin, and there would be no possible object in requiring a certificate that they did represent the next of kin if the fund to be paid to them was to be distributed according to the will as assets of the estate.

The meaning of the proviso is made clear and intelligible if we suppose that Congress, assuming that the awards were to go to the next of kin in any event, undertook by this clause to provide the mode of payment and the necessary safeguards. But if we may not give to such a conjecture the force of law, we are bound to give effect to the law as it stands. How can we give effect to the law requiring a certificate from the Court of Claims unless the person to whom the money is paid does in fact and for the purpose of that payment represent the next of kin? The express requirement of a certificate that the

administrator represents the next of kin implies, of course, the requirement of the fact certified, *i.e.*, that he does represent them. Payment then is to be made to an administrator only in case he actually represents the next of kin. In what possible sense can he represent them in receiving payments except that he receives on their behalf?

(*c*) *Buchanan* v. *United States*, 24 Court of Claims, 74, from which we have already quoted at length (*ante*, p. 9), and which was undoubtedly before Congress when the act was passed, assumed that the findings of the court as to the legal ownership of the claims were merely formal, and would need to be supplemented by additional legislation.

> "When the validity of a claim as against France, and the amount of the loss which an American citizen suffered by her privateers, have been determined, the court can render no further assistance to the legislative branch of the government, and it will still remain the duty of Congress to determine two things: first, the measure of the indemnity for which the United States should be held responsible; and, second, the persons who are equitably entitled to receive it" (p. 82).

Such additional legislation is to be found only in this proviso, and it points out, we submit, the next of kin as the persons who are "equitably entitled to receive" the fund.

The word "individual" is used to distinguish such claimants from corporations. This appears sufficiently from the opinion of the court in *Buchanan* v. *United States*, 24 Court of Claims, 74, 81, where the claimants are classified.

(*d*) It will possibly be contended that the requirement that the personal representatives shall represent the next of

kin is made by way of extra precaution, and merely for their protection in the event that in the due course of administration it appears that they have an interest, but without implying that they have such an interest in all cases. For example, in case of intestacy, if there were no creditors, and even in the case of a will in the very improbable event that there was no residuary clause in the will, the assets of the original sufferer's estate would go to the next of kin of the original sufferer.

It may be argued, therefore, that the object of requiring the Court of Claims to certify that the personal representatives represent the next of kin is to give the latter an opportunity to assert their claim if they have any.

But this theory, we submit, has been clearly negatived by an amendment to the act itself, passed August 23, 1894. It appears from the opinion of the Court of Claims in *Durkee* v. *United States*, 28 Court of Claims, 331, that one William Milligan, administrator of George Wattles, an original sufferer, had obtained an appropriation under the act of March 3, 1891, as follows: "William Milligan, administrator of George Wattles, deceased, $21,830." 26 Stat. 904. When Milligan applied to the Court of Claims for the certificate that he represented the next of kin, that court refused to grant the certificate, because "there were no blood relations of the original sufferer. The administrator had really presented the claim for the benefit of his widow's next of kin."

> *Durkee* v. *United States*, 28 Court of Claims, 331.

Congress therefore enacted, —

> "Section 5. That the sum appropriated to be paid to William Milligan, administrator of George Wattles, deceased, in the act of March third, eighteen hundred and

ninety-one, entitled, 'An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for prior years and for other purposes,' be paid instead to William Mulligan, administrator of George Wattles, deceased, but the amount thus appropriated shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representative on whose behalf the award is made represents the next of kin, or in the event the court shall find there were no next of kin, and that there was a widow, then that said sum be paid to the executor, personal representative, or next of kin of such widow."

28 Stat. 487.

Reading the above section in connection with what is said in the case of *Durkee* v. *United States*, 28 Court of Claims, 326, 331, we find that, since it appeared that there were no next of kin of the original sufferer, Congress made a new disposition of the fund. The Court of Claims, in refusing to grant the certificate in Milligan's case, went upon the theory that the fund was not to be treated as general assets of the original sufferer's estate, but that it was to go to the next of kin. Otherwise, and upon the theory of our adversaries that "next of kin" means any person entitled to the fund as assets of the original estate, there would have been no impropriety in granting the certificate upon the facts as they appeared. Congress, by providing for a new disposition of the fund, very clearly accepted the theory of the Court of Claims that the next of kin of the original sufferer were entitled to the fund when there were any such; and that where there were no next of kin, in the ordinary significance of the word, new legislation was required.

(*e*) The construction for which we contend is supported by reference to other acts of Congress and of the several states showing the general legislative policy in like cases.

The act of Congress of March 3, 1831, was "An act for the relief of Beverly Chew, the heirs of William Emerson, deceased, and the heirs of Edwin Lorraine, deceased," providing compensation for services rendered to the government in causing the seizure and condemnation of a vessel which had violated the slave laws. The act directed the money to be paid to the "legal representatives" of Emerson and Lorraine; and the court held that the creditors had no claim upon the fund.

6 Stat. 464.
*Emerson's Heirs* v. *Hall*, 13 Pet. 409.

The civil rights act of 1871 provides that the legal representatives of a person who is killed by a wrongful act in violation of the statute may recover damages for the benefit of the widow of the deceased, and if there be no widow, then for the benefit of the next of kin.

U.S. Rev. Sts. sec. 1981.

The act of Congress of February 17, 1885, provides that whenever in the District of Columbia the death of a person shall be caused by the wrongful act of another, the personal representative of the deceased shall have an action therefor, and the damages shall be assessed with reference to the injury resulting to the widow and next of kin of such deceased person.

"Sec. 3. The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall enure to the

benefit of his or her family, and be distributed according to the provisions of the statute of distributions in force in said District of Columbia."

23 Stat. 307.

In Tiffany's appendix to his book entitled "Death by Wrongful Act," is a very full collection of "Statutes giving a right of action for injuries resulting in death, in force in England, the United States, and Canada." More than sixty acts are there tabulated. In every case, without exception, whether the action is brought in the name of the executor or administrator, or in the name of the beneficiary, the claims of creditors are carefully excluded, and the damages recovered are paid to the husband or widow or kindred of the deceased.

Tiffany's "Death by Wrongful Act," App. 281–344 (1893).

3.

*Opposite Theories Examined.*

(*a*) It is contended that the whole proviso, including the requirement of a certificate, is limited, like the first clause, to those cases where the original sufferers were bankrupts. But we submit that such a construction is inadmissible. It would compel us to read the phrase "and the awards in the cases of individual claimants" as if it had been simply "and such awards." Some force must be given to the word "individual," distinguishing such claimants from corporations. But the sufferers referred to in the first clause *must* have been "individual" sufferers, since the awards are to be made in favor of their next of kin. The class referred to in the second clause therefore cannot be treated as a subdivision of the class referred to in the first clause.

Moreover, if the proviso relates only to bankrupts, then it does not affect or regulate in any way the payment of moneys under the act itself to which the proviso is attached, because all cases of bankruptcy were omitted from this appropriation act, as already shown.

This is not the construction adopted by the Court of Claims, which proceeds upon the assumption that its certificate is required in every case, whether the original sufferer was or was not bankrupt. Such certificates, for example, were granted in the present case. (Record, pp. 26, 36.)

See, also, *Adams* v. *United States*, 26 Court of Claims, 249, 290.

*Eldridge* v. *United States*, 26 Court of Claims, 253.

*Moore* v. *United States*, 26 Court of Claims, 254.

*Durkee* v. *United States*, 28 Court of Claims, 326, 330.

*Hooper* v. *United States*, 28 Court of Claims, 480.

Nor is it the construction of Congress itself (*ante*, p. 22).

(*b*) It has been suggested that "next of kin" may refer to persons, other than creditors, who are interested in the estate of the deceased, and may mean, therefore, in the case of a will, the legatees and their representatives. But there is no sufficient ground for such a departure from the literal construction. In order to read into the act words which are not there, it must clearly appear that such words were omitted by mistake.

We have already shown why Congress may well have supposed that, by following out the testamentary dispositions of the original claimant and of his legatees, it would have

been less likely to carry out the claimant's actual wishes than if the distribution were among his next of kin (pp. 16, 17).

Congress could not have overlooked the fact that the original claimants left wills, for the act itself in numerous cases makes the award in favor of the administrator with the will annexed. We have a right to assume, therefore, that if Congress had wished to provide for legatees, it would have said so, as it has done in other cases.

U.S. Rev. Sts. sec. 4896.

(*c*) It has been suggested that, since the fund has already been paid to the administrator with the will annexed of William Gray the elder, pursuant to the certificate of the Court of Claims that such administrator represents the next of kin, the question is now closed, and it remains only for such administrator to distribute the fund as assets of the estate. But this view of the binding force of the certificate has been distinctly repudiated by the Court of Claims itself.

> "The certificate required by the statute as a prerequisite to the payment of an award at the treasury into the hands of a personal representative does not determine the rights of beneficiaries, nor whether legatees can take to the exclusion of next of kin, or next of kin to the exclusion of legatees; but merely that there are next of kin in existence, and that the administrator who receives the money was appointed on the application and with the knowledge or acquiescence of the next of kin, and so far represents them that they will be able in the proper jurisdiction to enforce their rights against the fund in their hands. The purpose of the statute was to prevent the payment of money to an administrator who in fact represents nobody, or who may represent

only creditors or assignees in bankruptcy. The right to an award made by an act of Congress is a legal right which can be the subject of an action in other courts. The final determination of a right to these statutory awards is not within the jurisdiction of the court, and most certainly such a determination cannot be made on an *ex parte* application for a certificate which in legal effect merely authorizes payment to a personal representative. As a rule, application for letters of administration has been made by the 'next of kin' themselves, and the administrator has been of their selection, appointed upon their motion."

*Hooper* v. *United States*, 28 Court of Claims, 480, 482.

The several acts relating to the Alabama claims authorized the Court of Commissioners of Alabama Claims to receive and examine the claims therein described, and to render judgment thereon, and directed the Secretary of the Treasury to pay the judgments so rendered. But even under this act it was held that the judgments of the court "as to who were the owners of the respective claims" were not final.

*Williams* v. *Heard*, 140 U.S. 529, 539, 540.

The right of an administrator to maintain suit upon a policy in no way involves the question who are the beneficiaries of the policy.

*Rindge* v. *N.E. Mutual Aid Asso.*, 146 Mass. 286, 289.

The administrator cannot be heard to say that, whether the certificate of the court that he represented the next of

kin be true or false, he has complied with the act in procuring it, and that, having thereby obtained the money, he can or must hold it as assets of the estate. He is bound to the truth of the certificate which he has so procured and used, and estopped to deny that he represents the next of kin. Having received money which Congress directed to be paid to him upon a special trust, he cannot now repudiate that trust.

(*d*) It may be contended that administrators are ordinarily required to give bond only for the discharge of their duties as administrators, and that the last clause of the proviso implies therefore that the money received by them is to be administered as assets belonging to the estate.

To this we reply, in the first place, that it may be, and often is, the duty or the right of an administrator as such to receive money which is not to be administered as a part of the general assets, but is to be distributed in a particular way.

Under Massachusetts Pub. Sts. c. 144, sec. 5, the executor or administrator is bound to account to the devisee or the heir at law for rent of real estate, and for failure to do so he is liable upon his bond.

*Brooks* v. *Jackson*, 125 Mass. 307.

And the like result was reached in Missouri, where there does not seem to have been any special statute.

*Lewis* v. *Carson*, 93 Mo. 587.

A policy of insurance for the benefit of wife and children is collected by the administrator of the husband, but does not on that account become a part of the general assets. It is

his duty to pay the money so received to the wife and children according to the terms of the policy.

*Gould* v. *Emerson*, 99 Mass. 154.
*Rindge* v. *N.E. Mutual Aid Asso.*, 146 Mass. 286.

So, under various statutes already referred to, the executor or administrator is allowed to recover for loss of life by negligence for the benefit of widow and children or next of kin (*ante*, pp. 24, 25).

The executor of a surviving partner takes for the benefit of the estates of the several partners deceased.

*Buchanan* v. *United States*, 24 Court of Claims, 81.

These instances suffice to show that it is not unusual nor unreasonable to impose upon the administrator a special trust different from that under which he holds the general estate. Whether upon his general bond an administrator would be held for the performance of such special duty may depend upon the local statutes of each state. In some states the condition of the bond is that the administrator "shall well and truly do and perform all other things touching such administration," or "shall in general do and perform all other acts which may at any time be required of him by law," or "shall faithfully discharge the trust reposed in him as such."

Arkansas Digest of Statutes (1894), sec. 24.
Starr & Curtis Anno. Stat. of Ill. p. 202.
Bliss (N.Y.) Ann. Code (1895), sec. 2664.
Conn. Gen. Stat. sec. 448.

Such a bond might well protect all moneys coming into

the hands of the administrator as administrator, whether a part of the general assets or not.

But it seems hardly worth while to speculate upon the question whether Congress supposed that the ordinary bond of an administrator would cover this new duty, or whether a new bond would be required.

Even if additional legislation by the several states should be necessary, there would be no such hardship in demanding such protection for the persons in interest as to furnish a basis for the argument that the next of kin are not those persons, in the face of the express language of the act. And it is to be remembered, too, that such argument, if it is of any value, must go the whole length of holding that the fund must be distributed as new assets to the creditors of the original sufferer, to the exclusion both of the next of kin and of the legatees.

4.

*"Next of Kin," means Living Next of Kin.*

"Next of kin" under the act of 1891, means living next of kin, *i.e.*, the persons who would be the original sufferer's next of kin if he had died on the date of the passage of the act.

The money is paid as an indemnity for spoliations committed before 1801. It must be assumed, therefore, not only that the original sufferers are long since dead, but that those who were their next of kin at their death are also dead.

Turning to the genealogical table of William Gray's descendants (Record, pp. 6, 7), it will be found that William Gray the elder died in 1825, leaving all of his six children surviving, and that the last of these died in 1881. None of

those who were William Gray's next of kin at his death were living at the date of the act.

The objections to treating this fund as assets of the estate of the original sufferer apply with almost equal force to the view that the fund is to go as assets of the estates of his original next of kin. There might be some ground for giving the fund to the creditors of the original sufferers. There certainly could be no ground whatever for giving it to the creditors of the children.

Take the case at bar. Two of the six children of William Gray fell into distress. One of them, Henry, made an assignment to his four brothers. Another, Horace, became bankrupt. On what ground can it be contended that Congress intended to give this fund to the assignees or legatees of the children of William Gray? In all probability, none of those children would still be living, and if they were living they would be entitled under the construction which gives the fund to the living next of kin.

The Court of Claims must certify that the personal representatives "represent the next of kin." The construction put upon this requirement by the Court of Claims is that, before there can be a certificate of this fact, it must appear that some next of kin are now in existence.

> *Hooper* v. *United States*, 28 Court of Claims, 480, 482.
>
> *Durkee* v. *United States*, 28 Court of Claims, 326.

This seems to be the reasonable construction.

5.

*"Next of Kin" means Statutory Next of Kin.*

"Next of kin" under this statute should be so construed as to let in, by right of representation, the great-grandchildren of William Gray whose parents have deceased.

In all the states, without exception, real estate descends equally to children of the decedent, and to the issue of deceased children, taking *per stirpes*, and personal estate is distributed in the same manner.

It is believed that no statute regulating the devolution of property was ever enacted either in this country or in England, in which the right of representation among lineal descendants was not recognized.

Stimson's American Statute Law, sec. 3101: "In all the states, without exception, the real estate descends to the legitimate children of the decedent living at his death, and the issue of deceased children *per stirpes* in equal shares."

Sec. 3102. "A. In most states the personal property is distributed precisely as the real estate descends. . . . B. In other states, there being no widow or husband, the personal property of the intestate, after debts, charges, etc., are paid, is distributed to the children and their descendants, as in sections 3101, 3103, *per stirpes*."

Sec. 3103. "When all the children are dead, the grandchildren and the issue of deceased grandchildren take in all the states. A. *Per stirpes* in all cases to the remotest degree in the same manner. (Sec. 3101.) B. When all such issue or grandchildren are in the same degree, they take in equal parts *per capita*. Otherwise *per stirpes*, as in A."

In Massachusetts, as in all other states, the issue of deceased children stand in the parent's place in the laws of descent and distribution. But the phrase "next of kin" is

used repeatedly throughout the statutes as a short phrase, referring to those who take the real or personal property in case of intestacy.

Mass. Pub. Sts. c. 130, sec. 1; c. 136, secs. 26, 28; c. 125.

Several statutes of Massachusetts give a remedy for death by wrongful act to the executor or administrator of the decedent for the use of the widow and children, and, if there is no widow or children, to the use of the next of kin. The phrase "next of kin" is not defined in any of these statutes, but there can be no doubt that it refers to those persons who would take under the statute of distributions.

Mass. Pub. Sts. c. 112, sec. 212; c. 73, sec. 6; c. 52, sec. 17.
Mass. St. 1887, c. 270, sec. 2.

Under the civil rights act of Congress (*ante*, p. 24), damages for death by wrongful act are paid where there is no widow to the "next of kin;" and under act of February 17, 1885 (*ante*, p. 24), the damages are paid in like manner to the "next of kin;" but, by a separate section, next of kin is shown to refer in the later act to the statutory next of kin. It cannot be doubted that the phrase is to be given the same meaning in both acts.

Many statutes providing a remedy for death by wrongful act provide that the damages shall enure to the benefit of the "next of kin," and in every case where those words are defined at all, the statutory next of kin are shown to be intended. Such statutes are found in Illinois, Kansas, Minnesota, Montana, Nebraska, New Jersey, New York.

Tiffany's "Death by Wrongful Act," App. pp. 297, 299, 310, 314, 315, 318, 321.

It is true that after a long period of doubt, it was settled in England that the phrase "next of kin," *when found in the ulterior limitations of a will or settlement*, must be understood to refer to the nearest of blood.

*Elmsley* v. *Young*, 2 My. & K. 780.
*Withy* v. *Mangles*, 10 Cl. & F. 215.

But Lord CAMPBELL said, in *Withy* v. *Mangles*, 10 Cl. & F. 254, —

> "It seems to me that we are driven to put a construction upon the terms of the settlement which could not by possibility have entered into the contemplation of parties or the gentlemen who framed it. I do not think that there was any notion that, there being a child, the father and mother should share in the money that was settled, and, according to this doctrine which I think upon the whole we are now bound to follow, still more preposterous consequences might follow, because there might have been grandchildren, who would have had no share, who would have been entirely destitute, and the grandfather and the grandmother would have taken the whole."

Page 256:

> "It is impossible to deny that the law has by some bad luck got into a strange state, and that now, unless great caution is observed in framing deeds, very calamitous consequences will take place; and that upon deeds already drawn, where merely the words 'next of kin' occur without any words to specially point out the meaning, the intention of parties may be disappointed."

The English rule has been followed in Massachusetts and North Carolina.

*Swasey* v. *Jaques*, 144 Mass. 135.
*Redmund* v. *Burroughs*, 63 N.C. 242.

It has been rejected in New York and New Hampshire.

*Slosson* v. *Lynch*, 43 Barb. 147.
*Murdock* v. *Ward*, 67 N.Y. 387, 390.
*Tillman* v. *Davis*, 95 N.Y. 17, 24.
*Pinkham* v. *Blair*, 57 N.H. 226.

Even in the case of wills, the courts always lean towards a construction which shall let in all the lineal descendants of the testator or first taker, *per stirpes*.

*Hall* v. *Hall*, 140 Mass. 267.
*Bowker* v. *Bowker*, 148 Mass. 198.
*Jackson* v *Jackson*, 153 Mass. 374.
*Balch* v. *Pickering*, 154 Mass. 363.
*Teed* v. *Morton*, 60 N.Y. 502.
*Low* v. *Harmony*, 72 N.Y. 408.
*Geery* v. *Skelding*, 62 Conn. 499.
*Conklin* v. *Davis*, 63 Conn. 377.

In *Bowker* v. *Bowker*, 148 Mass. the court said (p. 203), —

> "Where a clause is fairly susceptible of two constructions also, that certainly is to be preferred which inclines to the inheritance of the children of a deceased child."

In *Low* v. *Harmony*, 72 N.Y., RAPALLO, J., said (p. 414) :

"When the language of a limitation is capable of two constructions, one of which would operate to disinherit a lineal descendant of the testator, while the other will not produce that effect, the latter should be preferred. An intention to disinherit an heir, even a lineal descendant, when expressed in plain and unambiguous language must be carried out; but it will not be imputed to a testator by implication when he uses language capable of a construction which will not so operate."

In *Geery* v. *Skelding*, 62 Conn., the court said (p. 501):

"When the terms of a will leave the intention of the testator in doubt, the courts generally incline to adopt the construction which conforms more nearly to the statute of distribution."

But whatever force may be given to the rule that "next of kin" means nearest of blood in wills, where the motives of the testator in selecting the objects of his bounty are to be inferred only from what he says, and his discretion is unlimited, a very different question is presented in the construction of a statute which can be justified only upon the ground that services rendered or losses incurred by an ancestor confer a right of compensation upon his next of kin. It is because the next of kin represent their ancestor, and only for this reason, that payment is made to them. In considering such an act there is strong ground for assuming that those who are made, by statute, the next of kin for the purposes of succession generally, are the next of kin intended by the particular law. It would seem impossible in such a case to allow a father or mother to take to the exclusion of a grandchild.

Under the act in question, the fund is paid not to the next

of kin directly, but to the personal representatives upon the certificate that they represent the next of kin. This fact alone disposes of any contention that the doctrine of *Withy* v. *Mangles* is applicable, since the only next of kin whom the administrator or executor can be said with any propriety to represent are the statutory next of kin.

In Jarman on Wills (5th ed.) 957, it is said, —

> "In numerous cases the term 'legal representative' or 'personal representative' has been construed as synonymous with next of kin, or rather as descriptive of the person or persons taking the personal estate under the statutes of distribution who may be said in a loose and popular sense to 'represent' the deceased."

Cases which have held that the statutory next of kin were the persons intended are:

*Briggs* v. *Upton*, L.R. 7 Ch. 376: In a marriage settlement the trustees were directed, upon the death of Jane Briggs without issue, and without having made any appointment to pay or transfer the said trust moneys and premises unto the "legal representatives of the said Jane Briggs, party hereto, in due course of administration."

*Booth* v. *Vicars*, 1 Coll. Ch. 6: A testator directed his trustees to pay the residue of personal estate on death of his widow to A and B, to be equally divided between them, share and share alike, if then living, but if dead, to go and be equally divided to and amongst the "respective next legal representatives of A and B, share and share alike."

*Bridge* v. *Abbott*, 3 Brown, Ch. 224: Bequest of residue of personal estate to certain persons, and if these should die in the lifetime of the testatrix, to their "legal representatives."

*Long* v. *Blackall*, 3 Ves. Jr. 486: Bequest of leasehold property in trust for the child of a son for life, and after his death, for such of his issue male as should be his heir at law at his death. If no such then living, for such as should then be the "legal representatives" of the testator.

*In re Gryll's Trusts*, L.R. 6 Eq. 589: Legacy in trust to daughter for life, and upon her death to such persons related by blood to F as she should appoint, and in default of appointment, to transfer the same to such persons as would be the "personal representatives" of F in case she had died sole and unmarried.

By a codicil, testator referred to the above trust as being for the benefit of the testator's "relations and next of kin."

*In re Thompson's Trusts*, 9 Ch. D. 607: Gift to "the heirs or next of kin of A, deceased."

6.

*The Decisions of Inferior Courts.*

All the decisions of inferior courts, except those which are now before this court for review, support our contention.

*Clement's Estate*, 160 Pa. St. 391 (1894), reversing *Clement's Estate*, 150 Pa. St. 85 (1892).

*Gardner* v. *Clarke*, 20 Dist. of Columbia, 261 (1891).

*Carey* v. *Morris*, 49 Phil. Legal Int. 147 (1892). Circuit Court, Baltimore, Maryland.

The decision of the Supreme Court of Pennsylvania reversing its own former decision is especially important for two reasons:

*First.* The first decision may fairly be held responsible, for the decisions in Connecticut and Massachusetts which follow that, and which are now before this court for review.

*Secondly*. When *Clement's Estate* came up for decision a second time, the court saw for the first time the practical application of its own earlier decision. It saw that under it the greater part of Jacob Clement's descendants would be cut off altogether from any benefit under the act.

We say that it is only necessary to contemplate the practical application of any other rule to see that the construction for which we contend is the only true construction.

Mr. Justice MITCHELL (p. 397):

> "Assignees in bankruptcy were expressly excluded, and the personal representatives were not to get the money until it should be certified to the Secretary of the Treasury that they represented the next of kin. By unquestionable implication, all other parties, assignees, devisees, residuary legatees, widows, surviving husbands, are also excluded. The right to the fund accrued in 1891 to those who were then the next of kin. That was the inception of the right, and those who were then deceased never acquired any interest of any kind in the fund, and of course could transmit none by will or otherwise. It never was, in fact, part of Jacob Clement's estate, nor of his children's, nor of his grandchildren's who died before 1891. Nor was it the intent of Congress that it should be so considered, for if it was first made *de jure* a part of Jacob Clement's estate, then the power of Congress to shut out the vested property rights of assignees, creditors, and others whose claims upon the estate were fixed by law, would be, at least, extremely doubtful. There was not only no such intent, but such construction was carefully guarded against."

In *Gardner* v. *Clarke*, 20 District of Columbia, there was

a well-considered opinion by Mr. Justice Cox, who said, in part (pp. 267, 268), —

> "In appropriating for the payment of awards, Congress has expressly provided that in cases of bankruptcy the award should be made to the *next of kin*, *instead of the bankrupt assignee*, thus ignoring the incident of ownership which the Supreme Court had held to attach to valid claims which had been recognized by the government. Again, if these were valid claims as held by the Court of Claims, they would pass by a voluntary assignment by the claimant or by his will, and would be assets in the hands of his personal representatives for the payment of his debts. But Congress says that the award shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made *represent the next of kin*. In other words, Congress says that the money shall not be paid to the executor or administrator for the benefit of creditors, or to assignees or legatees, but *only the next of kin*, which involves no recognition of *legal* property in the award, in the original claimant."

The Court of Claims, whose familiarity with this subject from the beginning gives its opinion of the intention of Congress peculiar weight, has clearly indicated its belief that the next of kin are entitled.

*Durkee* v. *United States*, 28 Court of Claims, 326.

*Hooper* v. *United States*, 28 Court of Claims, 480, 482.

In *Durkee* v. *United States*, the Court of Claims, after referring to two instances where, by special act, Congress had given the fund to other than blood relations of the original sufferer, said, page 332, —

> "Nevertheless the provision in the act of 1891, restricting relief to the next of kin, is general, and these two instances are special and exceptional. The court is of the opinion that the general provision of law must be maintained, and that an administrator must not be allowed to come in who, having neglected to institute proceedings within the jurisdictional period when he might have done so as a matter of right, does not now represent persons entitled to relief — that is to say, the next of kin of the original sufferer."

In this case, it was held that the administrator of the widow and sole residuary legatee of the original sufferer had no standing in court to prosecute a claim for an award, and that, since the original sufferer left no known next of kin, an administrator of his estate would not be substituted in place of the widow's administrator.

In *Hooper* v. *United States*, the Court of Claims said that the certificate required as a prerequisite to payment determined "merely that there are next of kin *in existence*," — a clear intimation that in the view of that court the next of kin are to be determined at the date of the act, and not at the death of the original sufferer.

## 7.

### *Conclusion.*

In behalf of Lucia Gray Alexander and the other heirs of Lucia Gray Swett, we ask for a judgment that the fund now

in the hands of Robert Codman as administrator of the estate of William Gray the elder, for distribution under the act of Congress of March 3, 1891, be distributed to those kindred, and in those proportions to whom and in which the said William Gray's personal estate would have been distributed if he had died intestate on said March 3, 1891.

If the court declines so to decide, then in behalf of Alfred Bowditch, administrator of the estate of Lucia Gray Swett, we ask for a judgment that the said fund be distributed equally among the legal representatives of the six children of William Gray.

W. G. RUSSELL.
JABEZ FOX.

# Supreme Court of the United States

**OCTOBER TERM, 1895.**

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**No. 284.**

WILLIAM GRAY BROOKS,

ADMINISTRATOR OF THE ESTATE OF HENRY GRAY, DECEASED, ET AL.,

*Plaintiffs in Error.*

v.

ROBERT CODMAN,

ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE NOT ALREADY ADMINISTERED OF WILLIAM GRAY THE ELDER, ET AL.

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# BRIEF

OF

## HARVEY D. HADLOCK,

**of Counsel for Plaintiffs in Error.**

## WILLIAM GRAY BROOKS,

**of Counsel for Plaintiffs in Error.**

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## FIRST.

STATEMENT OF THE CASE.

William Gray, who died November 14, 1825, by his last will and testament gave to his five sons the sum of one hundred thousand dollars each, and after having provided for his daughter Lucia, the wife of Samuel Swett, in the third clause of his will, by the fifth clause of that instrument gave the residue of his estate in equal portions to his sons, William R., Henry,

Francis C., John C., and Horace. By his said will his five sons, or the survivor of them, were appointed his executors (Record, p. 20).

No inventory of the estate was ever filed in the probate court in which the will was probated; but on September, 30, 1828, after the estate had been partly administered, schedules were prepared by the executors, showing in detail existing assets of the estate to the amount of $1,094,459.92. This amount included claims on —

| | |
|---|---|
| France prior to 1800 . . | $260,500 00 |
| France after 1800 . . . | 162,000 00 |
| Naples . . . . . | 142,100 00 |
| Denmark . . . . | 45,200 00 |
| Holland . . . . . | 13,600 00 |
| Spain . . . . . | 22,421 29 |
| Making a total of . . | $645,821 29 |

These claims, for the purpose of a settlement of the estate, were estimated at *one thousand dollars*. The residue of the estate was estimated at $154,000, thus making a total estimate of $155,000 (Record, p. 65).

An extract from page 213 of "Journal of Executors of William Gray," under date of April 30, 1828, the sum of $658,123.30 was divided by the executors among themselves, each receiving one fifth of the sum as patrimony, namely, $131,624.66 each (Record, p. 64). Henry Gray, on the 30th of September, 1828, was indebted to the estate in the sum of $327,389.47.

After deducting the amount of Henry Gray's patrimony, and his one fifth of the estimated value of the estate, $155,000, there remained due from him to the estate the sum of $189,368.42 (Record, p. 66). On the 8th of October, 1828, Henry Gray signed an instrument in words and figures as follows: —

"I request Francis C., John C., and Horace Gray each of them to apply my proportion of the proceeds of all property mentioned in the preceding schedule, and all other property which may come into their hands as a part of the estate of the late William Gray, Esq., to the payment of the balances due from me to the other residuary legatees, with interest, in equal portions; the said balance being the sum of $47,342.10 to each of said legatees, viz., William R. Gray, Francis C. Gray, John C. Gray, and Horace Gray, amounting in the whole to $189,368.42" (Record, pp. 63, 64).

On the 21st of July, 1829, an indenture was entered into between all the executors, by which Henry Gray assigned and conveyed to his co-executors in equal portions all of his right, title, and interest in and to all notes, balances, claims, and demands, and all other property, real and personal, mentioned in the said schedules, and all not therein mentioned, if any such there be, to which he was or might become in any way entitled as one of the residuary legatees, or one of the executors of said William Gray, or in any manner by or through him.

The consideration for this assignment and conveyance was a release and discharge to him of his indebtedness of $47,342.10 held by each of his co-executors (Record, pp. 21, 22). Of the claims scheduled G (Record, p. 45), there has been collected by the four co-executors and co-legatees or their representatives the following sums from European governments, under the treaty of July 4, 1831, with France, claims against France after 1801, $116,578.28; Naples, $133,385.39; Denmark, $14,473.42; Spain, $29,723.28; aggregating a sum of $294,160.37.

The sum now in controversy, under the acts of 1885, and March 3, 1891, is *one hundred twenty-two thousand nine hundred dollars and three cents.*

By the act of Congress of the United States passed March 3, 1891, making appropriations to supply deficiencies for the fiscal year ending June 30, 1891, and for the prior years, and for other purposes, there was appropriated, among other sums, an aggregate sum of $122,983.03 to pay the findings upon the fourteen claims reported in favor of the administrator who represented the next of kin of William Gray, deceased, and that is the amount now involved in the controversy presented to the court in the case at bar. The estimate of $155,000 for the purpose of effecting a settlement must have been a purely arbitrary estimate, as appears in the record (pp. 39, 40, 41, 42, 43, 44, and 45).

The only question to be considered is the construction of the act of March 3, 1891.

## SECOND.

### Assignment of Errors.

The errors apparent in the record, and relied upon by the plaintiffs in error, as stated in the record, pp. 33, 34, are as follows: —

*First.* That it was error in the Supreme Judicial Court of Massachusetts, under the treaties and statutes of the United States pertaining to the distribution of the fund in controversy, to order, adjudge, and decree that said fund was a part of the estate of William Gray, and to be distributed as such estate.

*Second.* That it was error in the Supreme Judicial Court of Massachusetts, under the act of Congress of March 3, 1891, to order, adjudge, and decree that the

fund in controversy be divided, as a part of the estate of William Gray, among the residuary legatees of William Gray or their representatives.

*Third.* That it was error in said court to order, adjudge, and decree that the assignments from Henry Gray to his four brothers, who were his co-executors, precluded the next of kin of William Gray who claimed through Henry Gray from a distributive share of the amount in controversy.

## THIRD.

SPECIFICATIONS.

*First.* That the Supreme Judicial Court for the Commonwealth of Massachusetts, under the statutes of the United States pertaining to the fund in controversy and the distribution thereof, should have directed the Supreme Judicial Court of Massachusetts within and for the county of Suffolk to order, adjudge, and decree that said fund was a gratuity, and as such, under the act of March 3, 1891, a distributive share of it should be paid to the next of kin of William Gray who claim through Henry Gray, and who were living at the time of its enactment; and it was error in said Supreme Judicial Court for the said Commonwealth by its decision to direct said Supreme Judicial Court to order, adjudge, and decree that the money held by the plaintiff as set forth in the bill of complaint, be paid over as assets of the estate of William Gray the elder, as passing under his will to the residuary legatees named therein.

*Second.* The said Supreme Judicial Court for the Commonwealth of Massachusetts should have directed said Supreme Judicial Court of Massachusetts for the county aforesaid to order, adjudge, and decree that the assignments of Henry Gray to his four brothers

and co-executors did not pass any interest in the spoliation claims now in controversy; and it was error in said Supreme Judicial Court for the Commonwealth by its decision to direct said Supreme Judicial Court to order, adjudge, and decree that the interest of Henry Gray in said fund now in controversy passed to his four brothers by his assignment of July 21, 1829.

*Third.* That said Supreme Judicial Court for the Commonwealth, under the act of Congress of March 3, 1891, should have directed the Supreme Judicial Court of Massachusetts for the county aforesaid to order, adjudge, and decree that the fund in controversy be divided and distributed among the next of kin of William Gray the elder who were living at the time said act was passed, and not among the residuary legatees of said William Gray, or their representatives; and it was error in said Supreme Judicial Court for the Commonwealth, by its decision, to direct the said Supreme Judicial Court to order, adjudge, and decree that the said sum in controversy be distributed in equal shares to the administrator of the estate not already administered of William R. Gray; to the administrator with the will annexed of the estate not already administered of Francis C. Gray the elder; to the executors of John C. Gray the elder; and one fourth thereof to William E. Coffin and William S. Bullard, surviving assignees, under the assignment made by Horace Gray for the benefit of his creditors.

## FOURTH.

### Outline of Argument.

*First.* That the sum now in controversy was never a part of the estate of William Gray the elder, but a gratuity from the United States to the next of kin of

William Gray living at the passage of the act of 1891.

*Second.* That the assignments from Henry Gray to his four brothers and co-executors did not pass to them any interest in or right to the sum now in controversy.

*Third.* That the words "next of kin" as used in the act of March 3, 1891, designate those who were the living next of kin to William Gray when the provisions of that act were enacted; and therefore the next of kin to William Gray who claim through Henry Gray are entitled to ten nineteenths of the sum in controversy.

## ARGUMENT.

### POINT FIRST.

*The sum now in controversy was never a part of the estate of William Gray the elder, but a gratuity from the United States to the next of kin of William Gray who were living at the passage of the act of* 1891.

The sum involved in the case at bar, arising by virtue of the act of Congress of January 20, 1885, by which act it is provided that such citizens of the United States, or their legal representatives, as had valid claims to indemnity upon the French government arising out of illegal captures, detentions, seizures, condemnations and confiscations prior to the ratification of the convention between the United States and the French Republic concluded on the 30th day of September, 1800, the ratifications of which were exchanged on the 31st day of July following, may apply by petition to the Court of Claims within two years from the passage of this act: "*Provided*, That the provisions of this act shall not extend to such

claims as were embraced in the convention between the United States and the French Republic concluded on the 30th day of April, 1803; nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain concluded on the 22d day of February, 1819; nor to such claims as were allowed, in whole or in part, under the provisions of the treaty between the United States and France concluded on the 4th day of July, 1831."

Spoliations by the French followed the proclamation of neutrality by President Washington, April 22, 1793, and were continued after the treaty of 1794 with Great Britain, as appears by the report of the Committee on Foreign Relations to the Senate of the United States, April 4, 1864.

The "Treaty of Amity and Commerce," as found on page 296 of a compilation by John H. Haswell, Government Printing Office, Washington, 1889, entitled "Treaties between the United States and Other Powers." By article 4 of this treaty, protection was granted to vessels of the United States, and by the same article protection from the United States was granted to vessels of France.

By article 15, indemnity was guaranteed for injuries to vessels of either nation. Said article is as follows:

> "And that more effectual care may be taken for the security of the subjects and inhabitants of both parties, that they suffer no injury by the men-of-war or privateers of the other party, all the commanders of the ships of His Most Christian Majesty and of the United States, and all their subjects and inhabitants, shall be forbid doing any injury or damage to the other side; and if they act to the contrary, they shall be punished,

and shall moreover be bound to make satisfaction for all matter of damage, and the interest thereof by reparation, under the pain and obligation of their person and goods."

It was provided by the treaty of alliance, treaties, etc., United States and other powers, p. 317, article XI., that —

"The two parties guarantee mutually from the present time and forever against all other powers, to wit: The United States to His Most Christian Majesty, the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace: And His Most Christian Majesty guarantees on his part to the United States, their liberty, sovereignty and independence, absolute and unlimited, as well in matter of government as commerce, and also their possessions, and the additions or conquests that their confederation may obtain during the war, from any of the dominions now or heretofore possessed by Great Britain in North America, conformable to the 5th and 6th articles above written, the whole as their possessions shall be fixed and assured to the said states, at the moment of the cession of the present war with England."

All the treaties with France are incorporated and published in the 8th U.S. Stat. at Large, pp. 178, 206, 207, 208.

The provisions of the treaties from which I have quoted show that the property of the citizen had passed to his government in making settlement with France, and had enured to its benefit, and it is evident

that he had no legal claim as against his government prior to 1891.

Such right as the citizen had to this property which had been seized, and which he might have urged under the power of his government against a foreign power; by the treaty of 1801, which rejected articles XI. and XV. of the treaties of 1778; merged in that of his sovereign, so that it could not longer be identified.

This claim now before the court is not analogous to the claims which accrued under the treaty of 1803, which provided that twenty millions of francs should be retained for debts due citizens of the United States from citizens of France.

The retention of that sum was for a specific purpose, namely, for debts due before 1800. That amount may well be said to have been held for payment to those who had suffered losses, and it was expressly agreed that the preceding articles should comprehend no debts but such as were due to citizens of the United States who had been and then were creditors of France for supplies for embargoes and prizes made at sea, in which the appeal had been properly lodged within the time mentioned in the said convention of the 8th Vendemaire, — September 30, 1800.

The sums awarded under those restrictions must be held to differ materially from sums involved in the case now under consideration.

In the case at bar, all claim on France had been relinquished by the government of the United States, and the citizen was wholly without a remedy for any loss which had accrued to him. The government of the United States had not seized or taken the citizen's property for its own use; but by treaty had withdrawn its protection from the citizen in the enforcement of his claims against a foreign power.

I submit that, under such conditions, it cannot be urged that the United States by that act assumed any liability towards the citizen, and therefore the citizen was left without any right to property which he could enforce against the foreign power under any circumstances. He stood in the position of a person who had lost all right to indemnity to the foreign government by the act of his own government while acting in its sovereign capacity, and his individual right had been made by the act of sovereign submissive to the public welfare. The citizen was not injured by the act, because "the sovereign can do no wrong,"— "*Rex non potest peccare.*"

This case as to the payment of claims stands upon very different grounds from that of payments made on account of spoliations by Spain. In the latter case a specific sum was paid to the United States by Spain for losses suffered by American citizens by reason of the acts on the part of Spain.

In the case of *Comegys* v. *Vasse*, 1 Pet. 193, Mr. Justice STORY questioned the application of *Campbell* v. *Mullet*, 2 Swanston, 551, which held that what claims were paid in that case were not paid as a matter of right, and what claimants obtained after condemnation was not founded in right to private property, but of hardship and injustice; and the court said, —

> "Though this therefore is not a case of pure donation, as of a gift, without anything in the nature of a consideration, yet, for the purpose of being contrasted with property or right, it is a donation, — not a restoration of a former right, but from a new fund belonging to an independent authority, — a grant to the sufferer for what he lost."

Mr. Justice STORY, speaking for the court, and commenting upon the above quotation, said, —

> "Such is the language of the learned judge, and we cannot say that the reasoning is at all satisfactory. It is not universally, though it may be one of the tests of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain nor the government of the United States is suable in the ordinary courts of justice for debts due by either. Yet who will doubt that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all his right to justice, or all claim upon principles of public law to remuneration. With reference to mere municipal law he may be without remedy; but with reference to principles of international law he has a right both to the justice of his own and the foreign sovereign."
>
> "The theory, too, that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation as contrasted with right, is not admissible. It is reasoning against the clear text of the treaty itself. What says the treaty of 1794, section 7? That where American citizens have sustained losses or damages 'by reason of irregular or illegal captures or condemnations of their vessels or other property, under color of authority or commissions from his majesty, and adequate compensation cannot be obtained by the ordinary course of judicial tribunals, full and complete compensation for the same will be made by the British government to the said complainants.' The very

ground of the treaty is that the municipal remedy is inadequate, and the party has a right to compensation for illegal captures by an appeal to the justice of the government.

"It was never understood that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice."

And continuing, the court said,—

"The remarks which have been made upon this case are equally applicable to the provisions for indemnity under the treaty of Spain. It recognized an existing right to compensation in the aggrieved parties, and did not in the most remote degree turn upon the notion of a donation or gratuity. It was demanded by our government as a matter of right, and as such it was granted by Spain."

It will be seen by a careful examination of this case that the court held the claim due the insurer to have attached when the property was captured, and that the *spes recuperandi* was a right which might pass by assignment in bankruptcy under the 18th section of the act of 1800.

It was a right because it could be, and was, enforced by the insurer's government, and paid to the insurer's government to reimburse the insurer for his losses sustained by the acts of Spain.

This section 18 contained a statement of such property as passed to an assignee in bankruptcy, and among enumerations contained one expressed in these

words: "Or whereby such bankrupt or his or her family then hath, or may have or expect any profit, possibility of profit, benefit, or advantage whatsoever;" and the court said that these words show that the mere interest *in præsenti* capable of present enjoyment were not alone within the scope of the legislative enactments, but also all such interest or possibilities of interest as might thereafter beneficially arise from present vested rights; and, proceeding, used these words: "It has been supposed that this clause looks solely to property which was not capable of assignment at the time of the bankruptcy, because not then vested, inasmuch as the bankrupt himself, and not the commissioners, is required to make an assignment of it."

The case of *Comegys* v. *Vasse* cannot be considered as an authority in the case at bar, so far as it rests on the right of Vasse to the amount paid by Spain on account of his losses, which amount passed to his assignee under the peculiar phraseology of the bankrupt act of 1800.

The ground of right is placed upon the fact that the losses sustained by Vasse created a right against Spain, and, although he could not enforce that right under the municipal law, by the principles of international law it was a right which he, through his government, could enforce.

The marked distinction between that case and the one at bar is this: In that case a sum of money which was the *spes recuperandi* was paid to this government for the benefit of citizens who had suffered by the acts of Spain, among whom was Vasse. What had been *spes recuperandi* had, by that act of his government, become a vested right, and as such passed by operation of law to his assignees in bankruptcy.

In the case at bar, the United States and France renounced all claims upon each other which had been provided for by article XI. of the treaty of alliance of February 6, 1778, and article XV. of the "treaty of amity and commerce," of February 6, 1778.

These articles being rejected, the subject matter of them was no longer open to demand against either government, and therefore whatever loss had been sustained which if it had not been for their rejection would have been repaired, was obliged to rest where it fell.

And from the moment the treaty of 1801 was ratified, the rights of the citizen to indemnity against France through the negotiations of his own government ceased, and, as a matter of history, those rights were never restored.

The *spes recuperandi* was blasted when these articles, by a solemn treaty, were rejected, and the hope of recovery never ripened into a right of recovery.

The action of the United States shows that it never considered that the losses sustained prior to 1801 were chargeable upon its treasury, because, if it had considered the claims for losses as a matter of right, it would not have delayed payment for the term of ninety years when the immediate sufferers in accordance with the course of nature must have long since —

> "Lived out their lease of life, and paid their breath
> To time and mortal custom."

If the right had existed, these earlier claims should have been paid before the claims which arose after 1801. But the fact that those claims were paid, while the claims now under consideration were delayed, demonstrates the soundness of my contention that they were rights which had been enforced by the government for the benefit of the citizen, and the amount due

held by the government and paid over to him when his loss was established, under the regulations provided by Congress.

In the case of the claims prior to 1801, no money was ever received from France for the payment of those claims; but the government rejected its right as a sovereign power to enforce them, and left the claimants without a right against France.

The right of the citizen was lost, and the bare possibility of recovery faded away when his government, by its treaty, precluded itself from claiming indemnity in his behalf.

That right having faded, it was never revived, because, according to the reasoning of the court in *Comegys* v. *Vasse*, *supra*, it was a right against the foreign government which the claimant's government only could enforce for his benefit under international law.

And it was by reason of such right that the claim became property *in præsenti*.

The treaty of 1819, upon which that decision was based, provided that —

> "The United States, exonerating Spain from all demands in future on account of the claims of their citizens to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same to an amount not exceeding five millions of dollars.
>
> "The payment of such claim as may be admitted and adjusted by the said commissioners, or the major part of them, to an amount not exceeding five millions of dollars, shall be made by the United States, either immediately at their treasury, or by the creation of stock bearing an interest of six per cent per annum, payable from

> the proceeds of the sale of public lands within the territories hereby ceded to the United States, or in such other manner as the Congress of the United States may prescribe by law."

This provision created a tribunal in which a claimant could have his *spes recuperandi*, which had become a right to indemnity which his government under the law of nations had given to him, enforced.

Therefore it may well be said, as in the case of *Comegys* v. *Vasse*, *supra*, that the ratification of the treaty which contained the provision above quoted gave to the citizen a vested right in the sum which by that commission must be paid for losses sustained by him which fell within the provisions of that treaty, and therefore such right passed by operation of law to his assignee.

But in the case at bar no obligation of payment was imposed upon the United States by reason of the ratification of the treaty of 1801 to pay any of its citizens for losses sustained by reason of acts on the part of the French government, and therefore the acts of the government in appropriating sums to pay for such losses as were found to have been sustained by its citizens priorto 1801 is purely a gratuity; as much so as granting a pension to the widow of a distinguished general who was uninjured during his service in the late war, and who at his death would not have been entitled to a pension by reason of injuries received in the service.

By section 6 of the act of 1885, Congress limits its liability by the use of these words:

> "And nothing in the act shall be construed as committing the United States to the payment of any such claims."

This language shows that Congress did not consider the claims a debt against the United States, or a liability incurred by it, but in express words treated it as an award made by it to the next of kin of the sufferers, and then declared that the act should not be construed so as to commit the United States to the payment of such award. By this section the United States disclaimed all legal liability, and treated the payment of the award to be made in accordance with the act of 1885 as a mere gratuity.

At most, the government only discharged what it may have deemed a moral obligation by the acts of 1885 and 1891, in providing for the granting to the next of kin that which, from a moral point of view, should have been granted to the ancestor who suffered by the act of a foreign power which by treaty was relieved from making amends to that ancestor for losses sustained by the acts of such foreign power.

I now urge upon the consideration of the court that the claim of Henry Gray to an interest in the sum represented in the case at bar had no foundation in law in 1828 and 1829, when the assignments were made by him to his brothers and co-executors, and that he at that time had no interest which he could assign so as to pass title to the sums which the government awarded in 1891 to the next of kin of William Gray.

In the case of *Emerson's Heirs* v. *Hall*, 13 Pet. 409, in which it appears that Emerson, as surveyor of the port of New Orleans, with others seized the brig "Joseph Secunda" for a violation of the law which prohibited the importation of slaves, and instituted proceedings against her which resulted in the condemnation of the vessel and slaves. In 1828, Emerson died leaving heirs. On the 3d of March, 1831, an act

entitled "An act for the relief of Beverly Chew, and the heirs of William Emerson, deceased, and the heirs of Edward Lorrain, deceased," was passed by Congress (6 Stat. at Large, 464). By this act the District Court of the United States for the district of Louisiana was authorized and directed to "order the proceeds of the said seizure now deposited subject to the order of said court paid over to the said Beverly Chew, and the legal representatives of the said William Emerson and Edward Lorrain, respectively." Mr. Justice McLEAN, speaking for the court, said, —

> "The question whether the sum of money received by the heirs of Emerson under this law was assets in their hands and liable to his debts was first raised in the court of probate, which decided that it was so liable, and this judgment, was, on appeal to the Supreme Court of the state, affirmed.
>
> "In the prosecution and seizure of the vessel for violation of law, Emerson, with those who cooperated with him, rendered a meritorious service to the public, but he acted under no law nor by virtue of any authority. And his acts imposed no obligation either in law or equity on the government to compensate him for his services. Had he been prosecuted on a debt due to the government, he could not have set up these services either as an equitable or legal offset. And this he might do under the rules of law of any specific demand he might have on the government which imposed on it even an equitable obligation.
>
> "A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does

> not go to the administrator as assets. It does not descend to the heir. And if the government, from motives of public policy or any other considerations, shall think proper under such circumstances to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation, — a donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government."

The above quotation, I submit, correctly states the law on the proposition now under consideration.

The ancestor, William Gray, had no claim against the government which he could enforce at his decease; and, to quote from this case of *Emerson's Heirs* v. *Hall*, on page 413 the court said, —

> "In the case of *Comegys et al.* v. *Vasse*, 1 Pet. 193, this court held that the assignees of a bankrupt are entitled to a share of the indemnity for unjust spoliation provided for under the treaty of 1819 with Spain. But that is not analogous to the one under consideration."

By the law of nations, Spain was bound to indemnify the owners of foreign vessels which had been illegally captured and condemned under her authority.

This sustains the view which I have been urging upon the court, that the liability of France under the law of nations to make indemnity to American citizens, was waived and annulled by the treaty of 1801, and therefore the only possible or contingent right to indemnity was lost. But because that right was lost as against France, that fact did not create a right of indemnity against the United States.

There was no obligation on the part of the United States to indemnify its citizens against losses caused by the acts of foreign powers, and therefore there was no right to indemnity from 1801 to 1891.

But the government, in consideration of the hardships suffered by the original owners of vessels captured and condemned by the French government prior to 1801, *ex gracia* made the appropriations contained in the acts of 1885 and 1891.

This fact precludes the theory of a vested right in 1828 and 1829 to damages for the losses by acts of the French prior to 1801, and demonstrates that Henry Gray had no interest in the subject matter of the case at bar which he could assign in 1828 and 1829.

In *Campbell* v. *Mullet*, 2 Swanston, 551, the court, in its opinion, p. 578, says, —

> "It is said that the sums awarded by the commissioners are not a matter of bounty or donation: can they be matter of right? What is right? That which may be enforced in a court of justice.
>
> "Had the parties whose property was condemned by irrevocable sentence, any right?
>
> "What they obtain after that condemnation is not founded in right, but in policy between the nations, providing compensation to individuals who have lost property by sentences which are thought unjust. The ground of relief before the commissioners is the want of redress in any municipal court.
>
> "Whatever the individual obtains is not on the ground of right of private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without anything in the nature of consideration, yet, for

> the purpose of being contrasted with property or right, it is donation, not restoration of a former right, but from a new fund belonging to an independent authority, — a grant to the sufferer for what he lost. . . . The inducements for one nation to give to the citizens of another this bounty are matters of liberality and conciliation, but not of strict legal right.
>
> "It may be said that there is a moral obligation to rescind an unjust sentence: if so, it is one of those imperfect obligations which cannot be judicially enforced.
>
> "This, therefore, is not a case in which property is recovered in a court of law by the medium of a sentence, and as a matter of right. . . . The parties claim not the thing itself, but compensation. Making application to indulgence for an equivalent, cannot be assimilated to recovery by right in adverse litigation."

*Burnand* v. *Rodocanachi*, L.R. App. Cas. 322. The respondents effected with underwriters valued policies of insurance (including war risks) on a cargo which was afterwards destroyed by the "Alabama," a Confederate cruiser, and the underwriters paid to the respondents as on an actual total loss the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss, and distributed under an act of Congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters.

> "Under the act of Congress, no claim was allowed for any loss for which the party injured should have received compensation from an insurer; but if such compensation should not have

been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured."

*Held*, affirming the decision of the Court of Appeals, that the underwriters were not entitled to recover the compensation from the respondents.

Lord SELBORNE, L.C., in his opinion says, —

"Whatever views of moral obligation may be entertained with regard to the act of Congress, I think it is correctly described by BRETT, L.J., as an act of pure gift from the American government. (12 Q.B. Div. 643-645.)

"We cannot go behind it and inquire into the motives for an act of a supreme legislature on a matter within their legislative powers; and, that being so, I am entirely unable, for any practical purpose, to distinguish this case, in which the supreme government of the United States, having absolute power of disposition over this fund, have by a solemn act of their Congress declared that it should be given, not in respect of the loss which had been identified as between the assurers and the assured, but in respect of the loss which the assured had suffered beyond that amount, — from the case of a voluntary gift by an individual in the same terms."

Lord WATSON says (p. 343), —

"Why the American Congress were not in a position to do the same thing as any third party might have done, not being under any obligation to do so, I have not been able to understand in

the course of this argument, and I do not think that any cause whatever has been shown why they should not do so.

"Legal obligation is out of the question; but we have heard something about moral obligation. I do not at all understand what that means. I think that this fund was entirely at the disposal of the United States, that it was an act of grace on their part to assign it, and give it either to one or the other of the losers by the acts of the 'Alabama,' and that in giving it as they have done, they were attaching a condition to the gift, which condition was not only entirely within their power by which they might attach it without violating any legal responsibility or moral obligation."

In *Burnand* v. *Rodocanachi*, L.R. 5 C.P. Div. 424, COLERIDGE, L.C.J., in the opinion says, —

"But was there any right? or was the awarding of the money by the United States merely a free gift of the money, a mere act of grace on the part of the United States government?

"If it was, I am of the opinion that this action would clearly not be maintainable. And at first sight there is much to be said for the contention that it is a mere act of grace. The money out of which this is paid to the defendants is a sum of money paid by Great Britain to the United States, from one sovereign state to another, and *Rustamjee* v. *The Queen*, 1 Q.B. D. 487; 2 Q. B. D. 69, is a distinct authority for holding that money paid by one sovereign state to another in respect of war losses occasioned by the paying state to the subject of the receiving state, gives no legal right whatever to a particular subject of the receiving state, compensation for whose loss

has been received by that state, capable of being enforced in any court against the sovereign or the government of that state. It is therefore no doubt clear that the defendants could have had no legal claim capable of being enforced against the United States in their sovereign character. . . . But it seems equally clear, as the result of great authorities both in England and in America, that, if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects as are morally entitled to share in the fund, then what their subjects so recover they recover as a right, not perhaps enforceable by law, but yet with such a character of moral equity about it as makes them, in respect of what they so recover, trustees for those who, in equity and justice, are entitled to it. . . . This appears to me to have been the principle (held in) by Lord NORTHAMPTON, Lord HARDWICKE, and Chancellor KENT when chief justice of New York. . . . The cases of *Blaauwpot* v. *Da Costa*, 1 Edan, 130, *Randall* v. *Cockran*, 1 Ves. 98, and *Gracie* v. *New York Insurance Co.*, 8 Johns., N.Y. Rep. 237, appear to me clearly to show that these great lawyers would have held the defendant liable.

"The language of Chancellor KENT, it may be said, is extra judicial, for there was no such right in existence in the case before him. It is so, but the judgment is considerate, and the deliberate opinion of Chancellor KENT is an opinion to which great deference is due."

The view taken by Lord COLERIDGE, that "if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects

as are morally entitled to share in the fund, then what their subjects so recover they recover as a right, not perhaps enforceable by law, but yet with such a character of moral equity about it as makes them, in respect of what they recover, trustees for those who, in equity and justice, are entitled to it," does not militate against our contention, as the act of the government, when it provided for the distribution of the claim, gave a right to those who came within the terms of the act, so as to entitle them to a distributive share of the sum to be distributed.

But it required an act of Congress to give that right, and to place the government in the *quasi* position as trustee.

The right spoken of by Lord COLERIDGE was created when the government provided for the distribution of a sum paid for the express purpose of indemnity for losses sustained by the acts of Great Britain, which were made specific before the tribunal that made the award against Great Britain, and therefore it may be well said that the United States held that sum for distribution, and when it provided for the payment of the same the individual right of the claimant undoubtedly attached. That is as far as Lord COLERIDGE went in his opinion upon this question of right.

From this last case it may well be urged that the right did not exist as against the United States until after the indemnity fund had been received by it, and it had made provisions for its distribution.

In the case at bar, no fund was ever received by the United States; therefore there never has been a holding in trust on its part, for the benefit of any person who is next of kin to one who suffered from French spoliations; and therefore it follows that no right existed to the sum, or any portion of it, now in the suit

at bar in Henry Gray during his lifetime which he could assign.

In the same case of *Rustamjee* v. *The Queen*, 1 L.R. Q.B. D. 487, COCKBURN, C.J., said, —

> "The facts are short and simple. English merchants who were English subjects in Hong Kong, were authorized by the existing law of China to trade only with merchants belonging to a particular guild called the Cohong. If individual merchants of the guild became indebted to such English subjects, the remedy was against the guild or Cohong itself. A debt was incurred by one of the members of that guild to the present suppliant, and his ordinary remedy to get this paid would have been by the proceedings established by the existing law of China against the Cohong. War broke out between this country and China; the Cohong was abolished, and the remedy which the British subjects, the present suppliant among them, would have had under the former state of things was swept away. Under these circumstances, when peace was restored, and a treaty of peace was entered into between the queen and the emperor of China, provision was made for doing justice to British subjects who had been deprived of their remedy to enforce their claims against members of the Cohong. But the terms of the treaty were that the money given by the emperor of China to make good these claims should be given, not to the individual merchants who had claims or debts against members of the Cohong, but should be paid to her majesty.
>
> "Now the effect of such a treaty is, in my opinion, simply this: that it places the fund at the

disposition of her majesty, for her majesty at her discretion to cause such distribution of it to be made as shall make good the claims which her subjects have against the foreigner from whose government the money is received. In such case a petition of right will not lie. The notion that the queen of this country, in receiving a sum of money in order to do justice to some of her subjects to whom injustice would otherwise be done, becomes the agent of those subjects, seems to me really too wild a notion to require a single word of observation beyond that of emphatically condemning it. In like manner, to say that the sovereign becomes the trustee for subjects on whose behalf money has been received by the crown, appears to be equally untenable. It comes simply to this, that her majesty, in order to enable her to see that injustice is not done to her subjects, stipulates for the payment into her hands of a sum of money. The distribution of that must be left to her majesty's discretion; no petition of right has ever been held to be applicable to such a case. To my mind, it is utterly inconsistent with all the constitutional theories of the prerogative of the crown to suppose that her majesty can be coerced by a petition of right into doing that justice which, I am quite sure, it will require no petition of right to obtain, if the facts and merits of the case were such as to induce the government to believe that the claim was a just one. At all events, I think the petition of right will not lie, and that that is perfectly clear upon all the principles which have been applied to petitions of right, and all the precedents which have hitherto existed in courts of law."

This last case, in which a specific sum had been, under a treaty, received for a specific purpose, gave no right of action to subjects, and the sum was held by her majesty for distribution at her discretion. And it was distinctly held that, under such a state of facts as appeared in the case, the sovereign did not hold the fund as trustee for the benefit of the sufferer.

In the case of *Kingsbury* v. *Mattocks*, 81 Me. 310, DANFORTH, J., said, —

> "In April, 1863, the plaintiff paid the sum of $1233.12 as war premiums on certain vessels insured against capture or destruction of Confederate cruisers. In May, 1868, he was adjudicated a bankrupt and the defendant was appointed his assignee. Under the act of Congress of June 5, 1882, by which the court of commissioners of Alabama claims was re-established, he made application to that court for a reimbursement of the premiums so paid. Subsequently, by reason of a rule adopted by the court, the defendant as assignee came in, prosecuted the claim to judgment, and, on September 15, 1886, received thereon the sum of $662.84.
>
> "The only question involved is whether the defendant holds that sum in trust for the plaintiff or as an assignee for the creditors in bankruptcy."

And continuing, and holding that the claim did not pass to the assignee and was not assignable, the court further said, —

> "Besides, if the claim was in any sense a debt so as to be assignable as such, there must necessarily be a debtor. Here there is, or was at the time of bankruptcy, none. There is no pretence that there was any claim upon the United States

government, and it is conceded that whatever it did on behalf of the claimants was in pursuance of a duty as agent for or protector of its subjects.

"It may be true that the claim is now assignable. But on what principle of law or equity the result contended for should follow is certainly not apparent. The assignment covers only property existing at its date."

This last decision is directly in point to show that Henry Gray had no right which he could assign in 1828 and 1829, and therefore I submit that the assignments should have been limited to such property as he had an assignable interest in when the assignments were executed.

In *Prossor* v. *Edmonds*, 1 Y. & Coll. 481, on page 496, Lord C. B. ABINGER said, —

"But where an equitable interest is assigned it appears to me that, in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment."

In *Brooks* v. *Ahrens*, 68 Md. 212, ALVEY, C.J., said,

"The facts show that there was not even a possibility of interest which might thereafter beneficially arise from any existing vested or even contingent right. . . . And without the existence of a right the bare possibility that the government might at some future day, say as an act of generosity or benevolence, provide out of a fund in its control for reimbursement of war premiums that had been paid, clearly constituted no part of a bankrupt estate."

These citations mark a distinction between acts on the part of the government when distributing a sum received from a foreign government for the express benefit of citizens of the United States, and the bestowal of a sum by the United States upon certain of its citizens, because of losses which they had sustained by a foreign government, in the absence of a direct appropriation by such foreign government to pay such losses.

The Act of March 3, 1891, gave no assignable right or interest in the sum now in controversy previous to the time when the act went into effect; and up to that time no assignable interest attached to it, and therefore an assignment made before the 3d of March, 1891, cannot affect the gratuity bestowed upon the next of kin to William Gray; living at the date of the act; by the government of the United States.

In the case of *Williams* v. *Heard*, 140 U.S. 529, on page 538, Mr. Justice LAMAR, speaking for this court, said, —

> "The fund was at all events a national fund, to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the act of Confederate cruisers, and justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded; nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund."

And I respectfully submit that by the weight of both reason and authority, Henry Gray had no assignable interest in the subject matter of the suit at bar which passed by the assignments of October 8, 1828, and July 1, 1829.

## POINT SECOND.

*The assignments from Henry Gray to his four brothers and co-executors did not pass to them any interest in or right to the sum now in controversy.*

The sum in controversy, the distribution of which is now before this court, had no existence prior to January 20, 1885.

And by section 6 of the act of 1885, Congress limited its liability by the use of these words:

> "And nothing in the act shall be construed as committing the United States to the payment of any such claims."

The assignment dated October 8, 1828, was more in the form of an order from Henry Gray to his four co-executors to apply his proportionate part of the proceeds of all the property mentioned in the preceding schedule, and all other property which might come into their hands as a part of the estate of William Gray, to pay the sum of $47,342.24 to each of his four co-executors (Record, p. 65).

The condition precedent upon which the payment of this money rested under the assignment of October 8, 1828, was that the proceeds of all the property mentioned in the schedules A, B, C, D, E, F, and G (Record, pp. 39, 40, 41, 42, 43, 44, and 45) which might come into the hands of his co-executors *as a part of the estate of William Gray* should be applied for the benefit of his co-executors.

This language limited the sums to be applied on the notes to such sums as should be received by them as a part of the estate of William Gray, and had no application to such sums as should be given as a gratuity to the next of kin of William Gray.

It must be a part of the estate of William Gray, to which Henry Gray should be entitled as a legatee under the will of William Gray, and did not include such sums as might come to him from other sources, as by bequests, donation, or accumulations.

And I submit that the discussion of my first proposition has demonstrated that the sum in controversy was never a part of the estate of William Gray; and therefore the assignment of October 8, 1828, can in no wise be held applicable to it, or affect it so as to divert it from the next of kin of William Gray who were living when the act of March 3, 1891, went into effect.

The indenture entered into on the 21st of July, 1829, is broader in its terms than the assignment of October 8, 1828, in this particular; namely, —

> "And whereas there were and are certain notes, balances, and other demands due to said executors, yet uncollected, and certain real and personal property of said William Gray's estate not all finally distributed, and certain claims and demands on our own and other governments still unsettled, all which were intended to be truly described in certain schedules marked A, B, C, D. E, F, and G, annexed to said accounts, and were therein valued for settlement at $155,000, which amount was passed to the several accounts of the five residuary legatees in equal portions, being a sum of $31,000 to each, it being understood and agreed that the portion of Henry Gray, and the proceeds thereof, should be assigned and applied

towards the payment of the balances aforesaid, and sundry conveyances having been made accordingly: now, therefore, I, the aforesaid Henry Gray, on execution of said agreement and understanding, and in satisfaction of the balances aforesaid, do hereby assign, transfer, release, and convey to the parties of the first part, in equal portions, all my right, title, and interest in and to all notes, balances, claims, and demands, and all other property, real and personal, mentioned in the said schedules, and all not therein mentioned, if any such there be, to which I am or may become in any way entitled as one of the residuary legatees, or one of the executors of said William Gray or in any manner by or through him." (Record, pp. 21, 22.)

In order that the assignment of July 21, 1829, may be effective to convey the property described, it must be property of the estate of William Gray which the said Henry Gray would be entitled to as a residuary legatee or executor of the last will and testament of William Gray, and it must be property to which Henry Gray would be entitled, and therefore it must come from the estate of William Gray. It makes no provision for property received from any other source than William Gray; and if Henry Gray had received a gratuity from the United States, it would not pass by the conveyance, as nothing that did not come from the estate of William Gray, or through or by William Gray, could pass by virtue of this assignment.

It was strictly limited to property which had vested in William Gray, and therefore it must be such property as the executors could hold as a portion of the estate of William Gray, and a right to which they could enforce as such executors.

In other words, it must form a part of the estate of William Gray.

The sum now in controversy was not in being when Henry Gray died in 1854, and therefore he was never entitled to it. Neither did it come to him by or through William Gray as having formed a part of his estate.

This sum now in controversy was never reduced into possession by the executors of William Gray, and was not in being during their lives. The last of the executors, John C. Gray, died in March, 1881. Had he lived until the 3d of March, 1891, he, as the next of kin of William Gray — all of his other children being deceased — would have been entitled to the sum in controversy; but all of the children of William Gray having deceased before the act of March 3, 1891, the grandchildren of William Gray became his next of kin, and under the act for distribution, those who were living on the 3d of March, 1891, became entitled to receive the sum in controversy *per capita*.

The assignments of Henry Gray could not deprive them of the gratuity bestowed upon them by the government.

It cannot be seriously urged that the government intended to place this gratuity in the hands of the dead who were during their lives next of kin to William Gray. If the government had intended that the sum should become a part of the estate of William Gray it would have so declared, and then it would have been treated as property which had come to the estate, and which was due William Gray in his lifetime.

I have contended in my first proposition that the liability of France, under the law of nations, to make indemnity to American citizens was waived and annulled by the treaty of 1801, and therefore the only possible or contingent right to indemnity was lost. But because that right against France was lost,

that *per se* did not create a right of indemnity against the United States.

And Congress, in the act of January 20, 1885, declared that nothing in that act should be so construed as to commit the United States to the payment of any such claims as those from which the sum in controversy arose.

I respectfully urge upon this court that the assignments of Henry Gray made in 1828 and 1829 cannot be so construed as to affect the distribution of the sum now in controversy to the next of kin of William Gray who were the children of Henry Gray, and living at the time when the act of March 3, 1891, went into effect.

The next of kin of a deceased person are those of his blood relations who survive him and are nearest to him in the line of descent.

Had William Gray placed a sum in trust to be distributed to his next of kin in 1891, would it be held that such sum should pass to the administrators of his deceased children, all of whom had long before that date deceased, to be administered upon as a part of their estate and applied to the payment of legacies or claims against their estate?

Would it not be assumed that he intended such sum for the next of kin who should be living in 1891?

The dead cannot receive and hold property, and therefore, when Congress, by the act of March 3, 1891, provided that the awards should be paid to the next of kin of the original sufferer, it meant those who at the time of the act were living and capable of receiving it. The sons and daughter of William Gray had been next of kin to him during their lifetime; but when death had removed them they were no longer his next of kin, but their children, the grandchildren of William Gray, became his next of kin,

because they then stood nearest to him in blood, and were alone capable of receiving the sum designated to be paid to the next of kin of William Gray.

In *Gardiner* v. *Clarke*, 20 Wash. Law Rep. 2, Mr. Justice Cox of the Supreme Court of the District of Columbia, speaking for the court and construing the act of 1891, among other things said, —

> "It is the money of the United States which Congress could appropriate as it thought proper, and the courts have no right to divert the appropriation from the parties in whose favor it was made to others to whom they might think it ought to have been given. We can only determine to whom it was given, and we have no difficulty in reaching the conclusion that it was intended for the benefit of those who were next of kin to the deceased original claimant at the time the award was made."

In *Clement's Estate*, 160 Pa. St. 391, Mr. Justice MITCHELL, speaking for the court, among other things in the unanimous opinion of the court, says, —

> "This case has suffered from its intricacy and its unusual character. The important facts require to be briefly restated. The act of Congress of 1891 awarded to the administratrix of Jacob Clement, on account of his losses by the French spoliations, two sums, the net proceeds of which constitute the fund now in court for distribution. At the date of the act Jacob Clement was, of course, dead, and all his children were dead. There were living, however, four grandchildren, children of a son, Samuel, and thirteen great-grandchildren, issue of seven deceased children

of a daughter, Mary English. The questions to be determined were, who were the next of kin meant by the act of Congress, and in what proportion were they to take? . . .

"The assignment of errors to this exclusion brings up the whole subject anew of the intent of the act of 1891, as to the persons who were to take, and their apportionate shares. . . .

"Further consideration and better acquaintance with the whole case have convinced us that our first views, as expressed in 150 Pa. St. p. 85, are not sustainable, and that the case must be overruled.

"The fund was a pure gratuity from Congress, though it had a moral claim back of it that was the moving force of the gift. . . .

"This, as already said, was a pure gratuity.

"There was no right in any one which could be enforced, or which had any recognition at all in law.

"Congress, therefore, in making the gift, were free to make it to whomsoever they chose, and upon whatsoever terms. It was made to the next of kin, and the intent that it should go to them in their own right, as standing in the place of the original claimant, is apparent throughout this act as well as the preliminary act of 1885. . . .

"The right to the fund accrued in 1891 to those who were the next of kin.

"That was the inception of the right, and those who were then dead never acquired any interest of any kind in the fund, and of course could transmit none by will or otherwise.

"It never was, in fact, part of Jacob Clement's estate, nor of his children's, nor of his grandchildren's who died before 1891. Nor was it the

intent of Congress it should be so considered. For if it was first made *de jure* a part of Jacob Clement's estate, then the power of Congress to shut out the vested property rights of assignees, creditors, and others whose claims upon the estate were fixed by law, would be at least extremely doubtful.

"There was not only no such intent, but such construction was carefully guarded against."

## POINT THIRD.

*The words "next of kin," as used in the act of March 3, 1891, designate those who were next of kin to William Gray when the provisions of that act were enacted, and therefore the next of kin to William Gray who claim through Henry Gray are entitled to ten nineteenths of the sum in controversy.*

The right which the act bestowed upon the next of kin had its origin with the act of January 20, 1885, and the provisions for the distribution of the sums provided for by that act were limited, by the act of March 3, 1891, to the next of kin.

I have submitted, in considering my first proposition, that no right existed in William Gray to a recovery against the United States at the time of his death, and that all hope of recovery against France had been cut off by the treaty of 1801, and therefore he was left without a right to indemnity as against France, and that no provision was made on account of such losses until the act of 1891; therefore it follows that, from 1801 until the time of his death in 1825, he had no right of indemnity for the losses which he had sustained by acts on the part of the French which he could enforce, or which his government in his behalf could enforce against France, and, as a necessary

sequence of that, he had no right or interest in the subject matter of this suit which he could devise by his last will.

The language of the statute of March 3, 1891, is as follows: —

> "Provided, that in all cases where the original sufferers were adjudicated bankrupts, the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the court of claims shall certify to the Secretary of the Treasury that the personal representative on whose behalf the award is made represents the next of kin, and the courts which granted the administration respectively shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

I shall, with great deference to the interpretation of this provision of the act of 1891 above quoted, intimated by the Supreme Judicial Court of Massachusetts in the recent case of *Balch, Pet'r*, v. *Blagge et al.*, 157 Mass. 144, contend that the language of that act limits the payment of the award which is the subject of this litigation to those who were the next of kin to William Gray on the 3d of March, 1891.

The provision contained in the first sentence of this act, which provides "that in all cases where the original sufferers were adjudicated bankrupts, the award shall be made on behalf of the next of kin instead of assignees in bankruptcy," did not provide for a distribution of the award when the original sufferer had been declared a bankrupt, different from its distribution in cases where the original sufferer had not been ad-

judged a bankrupt, is evident from the fact that, in cases of individual claimants, the award shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made, represent the next of kin, and the courts which grant the administration respectively shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards.

If the award was to be treated as a part of the assets of the original owner, and considered a debt due him, having accrued to him from the United States in 1801, when France by treaty was released from her obligations to him, then under the bankrupt law an assignee of an original sufferer who had been adjudicated a bankrupt would have become vested with a right to the amount due him, and such right would have become a vested right such as the Constitution of the United States contemplates. If it be held that the government assumed the liability which had existed against France, then there was an implied contract to pay to the claimant the amount due, and in case of bankruptcy the assignee in bankruptcy would become vested with all the rights which the claimant had at the date of bankruptcy.

> "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, — by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation."
>
> *Louisiana* v. *New Orleans*, 102 U.S. 203.

Mr. Justice SWAYNE, in *Walker* v. *Whitehead*, 16 Wall. 315–317, said, —

"The Constitution of the United States declares that no state shall pass any 'law impairing the obligation of contracts.'"

The propositions may be considered consequent axioms in our jurisprudence.

The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the success of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment.

The obligation of a contract "is the law which binds the parties to perform their agreement."

Any impairment of the obligation of a contract — the degree of impairment is immaterial — is within the prohibition of the Constitution.

If duty created an obligation on the part of the United States to pay an original sufferer for his losses, then there was an implied contract to pay.

*Carey* v. *Curtis*, 2 Black, 461.
*Fiedler* v. *Curtis*, 2 Black, 461.

If there was an implied contract on the part of the government to pay an original sufferer who became a bankrupt, then, by operation of law, all the rights that the bankrupt had vested in his assignee, and the property of the bankrupt, were held by him in trust for distribution. And if his property was held in trust for the benefit of creditors, by what power could Congress divert it from the assignees, and give it to others who have no right to it?

It is true that the constitutional prohibition to which I have referred is an inhibition upon states; but the principles stated, and the reasons for the prohibition, should be equally binding upon Congress.

And if the property once vested in an assignee, would not the act excluding assignees from receiving it be a taking of private property within the terms of the Constitution providing for compensation on the part of the government?

*United States* v. *Russell*, 13 Wall. 623, 627.

If it would, then can it be urged that Congress, by thus diverting the estate of a bankrupt from the channel which the law had made for it to flow in, had not taken private property for its own use in awarding the next of kin of the bankrupt for losses sustained by their ancestor?

Is it not more reasonable to say that Congress intended the award for the benefit of the surviving next of kin of the original sufferer, and did not consider it as a part of his estate at the time of his death? By the last construction no violence is done to such supposed rights as existed before the passage of the act of 1891.

If it was, as I contend, a gratuity, and not a payment of a debt, then Congress had the right to direct to whom the gratuity should pass.

That the amounts awarded were for the next of kin of the sufferers is evident from the fact that Congress provided that the Court of Claims should *certify that the personal representatives on whose behalf the award is made, represent the next of kin.*

If the awards were to be distributed as the assets of the original sufferer, what occasioned the necessity of such a certification?

Would more have been required than to have it appear that the person claiming the award was the legal representative as administrator of the original sufferer?

If the award be a part of the assets of the estate, then it is subject to be controlled by will, which may exclude the next of kin from any participation in it.

If it be considered a part of the original sufferer's estate, to be administered as assets, what was the necessity of using the words "next of kin?"

It does not follow, because a man has an estate, that his next of kin will receive it at his death; but it does follow that if he has an estate and dies intestate, that it will be distributed to his next of kin, *per stirpes*.

If, in the case at bar, William Gray, after devising some specific legacies, had left the rest and residue of his estate to some public charity, would it not have been the duty of the executors to pay over all that came into the assets of the estate, exclusive of the legacies, to the charity to which he had devised the residue?

And if such had been the fact, would it not be the duty of the representatives of his estate to so pay it?

Could the estate, if such a state of affairs had existed, been withdrawn from such charity and distributed to the next of kin, if the award represents a right of property which he had at the time of his decease?

Can the words "next of kin" be construed so as to mean the devisees or assignees of the original sufferer without doing violence to the act of 1891?

If it be held that the act intended the next of kin at the time of William Gray's death, then it did not contain suitable words to convey that meaning.

The benefactions of the government were not intended to be bestowed upon the dead descendants of William Gray, nor their devisees, but upon his next of kin living at the time when the act went into effect.

If Congress had wished to include devisees and assignees, it would have used those words in its acts; but it did not use those words, and I submit there is no rule of construction that will now admit of their interpolation for the purpose of giving an effect to the statute different from the plain import of its language.

I am not unmindful that the court, in *Balch* v. *Blagge*, *supra*, said, —

> "As the next of kin are the next of kin of the original sufferer, to be represented usually, if not always, by the administrator or the executor of his estate, we think that the next of kin must be ascertained as of the death of the original sufferer. This is the general rule where next of kin take property by bequest or descent."

I shall not attempt to controvert the general rule stated by the court in that case, because that rule is applicable whether the next of kin take property by bequest or descent; but they take directly from the testate or intestate, and they take property of which he was possessed at the time of his death.

Then the only direction given to its distribution is determined by the law of his domicile.

In the case of *Williams* v. *Heard*, 140 U.S. 529, on page 538, Mr. Justice LAMAR, speaking for this court, said, —

> "It was held in *United States* v. *Weld*, 127 U.S. 51, that this award was made to the United States as a nation. The fund was, at all events, a national fund, to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as jus-

> tice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund."

If Congress was not under any legal or equitable obligation to pay any claim out of the proceeds of that fund, then certainly the claimants had no property in it until after Congress declared, by the act of 1874, that the fund, or a part thereof, under certain conditions should be paid to the claimants, then the right to the claim attached so that a subsequent bankruptcy on the part of the claimant would pass his interest to his assignee. *A fortiori*, it may well be urged that the next of kin of the original sufferers had no claim to the fund before the court until after the act of 1891.

The case at bar, as I have heretofore urged, differs widely from claims arising under the Geneva award. The rights which attached to those claims when the wrong was committed were never lost nor relinquished, and the United States, in behalf of its citizens who had suffered, prosecuted their rights, and received the amount which was afterwards paid out to the sufferers. In the last case the sufferers were made the recipients of it because, by reason of the short time which had elapsed from 1861 to 1874, when the act was passed, — only thirteen years, — the original sufferers might well be presumed to be in a condition to receive the award in person, and thus the award would become a part of the assets of those who

had suffered by losses sustained by reason of the acts of Great Britain.

It is said in *Balch, Pet'r*, v. *Blagge et al.*, *supra*, that —

> "The proviso concerning the next of kin may perhaps be taken to indicate that Congress did not intend that the awards should be paid to or for the benefit of the creditors of the original sufferers. Congress did not concern itself with the bankruptcy of the next kin or with their creditors. If Congress had intended that in all cases the awards should be paid to or for the benefit of these next of kin of the original sufferers who were living at the date of the act or at the date of the awards, it would have been easy to have said so in a few words."

I respectfully submit that, as an act of justice, if Congress had been willing that the assignees of any person should have the benefit of the award, it would have preferred the assignees representing the creditors of the original sufferers, who had suffered because of losses upon which the awards are based, rather than an assignee of the sons of such original sufferers. And if it had intended that the next of kin of the original sufferer should be those who were alive at the time of his death, it would have provided that it should not pass to the assignee in bankruptcy of any next of kin. That certainly would have been as easy as the provisions suggested by the court, which I have quoted.

And can it be assumed that Congress would exclude the creditors of the original sufferers from benefit in the awards, and give the benefit to the creditors of an intermediate next of kin?

If the next of kin now in existence were intended by Congress to be the recipients of the award, then we have a reason for not mentioning assignees in bankruptcy, as at the passage of the act a general bankrupt law was not in force.

I submit that the act makes clear the intention of Congress when viewed in the light of all surrounding circumstances. The long time that had elapsed since the losses occurred rendered it probable that all of the original sufferers had each passed to—

"The lone couch of his everlasting sleep."

Therefore they could not be benefited by the awards. And it was also probable that those who were their immediate next of kin had walked, too,—

"In the thick footprints of departed men."

And therefore it was the present, the living, next of kin which Congress had in view when it passed the act of 1891.

If John Doe should bequeath one hundred thousand dollars to the next of kin of William Gray, would this court have any difficulty in determining who John Doe intended, especially if his will was executed in 1891?

Would it be any more certain if he had said in his will "the living next of kin of William Gray"?

What does the word "next of kin" mean when used in the present tense, if not those who, at the time when it is used, are living?

If Congress had intended that those who were next of kin of William Gray at his death should receive the award, it would have so expressed itself. That would have been comparatively easy.

"'Next of kin' is a term used to signify the re-

lations of a party who has died intestate."—*Bouv. Law Dict.* (14th ed.) p. 226.

According to the civil law, it is a person's nearest relations. It means those who stand in the nearest degree of blood relationship to the deceased.

"The 'next of kin' are those relatives of a decedent entitled to the personal estate under the statutes of distributions.

"A person's nearest relatives according to the civil law.

"In either use it means that one (or more) who stands in the nearest degree of blood relationship to the deceased."—*The Century Dictionary*, vol. iii. p. 3286.

This act, by the use of the words "next of kin," treats the distribution as though the original sufferers had died intestate, as it has excluded all words which would pass the awards to the devisees of the descendant of an original sufferer.

Therefore I contend that the act included the next of kin to William Gray living at the date of its passage, as the law does not contemplate a distribution among the dead, and that the sons of William Gray who died without issue, but testate, are not represented in the distribution of the award, any more than they would have been if they had died before their father, William Gray.

The next of kin to William Gray receive the award as his next of kin, irrespective of his will, which took effect in 1825. If the intention of Congress had been otherwise, it would so have expressed itself by saying the next of kin, or those to whom the original sufferer devised his estate. It must be evident to this court that the only equitable distribution of the fund

must be to the next of kin to William Gray living March 3, 1891.

In *Clement's Case*, 150 Pa. St. 85, the court says,

> "The leading thought that pervades the act of 1885 is, that certain citizens of the United States had sustained losses by reason of the failure of their government to extend to them that protection that is due from government to citizens or subjects, and that the United States owed these citizens, or those who stood in their shoes, some duty in respect to the losses so sustained. The obligation, it must be admitted, was an imperfect one, and Congress was careful, perhaps unnecessarily, to declare that nothing in the act contained should be construed to commit the United States.
>
> "But it is contended that the proviso to the appropriation is evincive of an intent to make a direct gift to the next of kin of Jacob Clement, the original claimant.
>
> "If this be so, the intent was futile for want of power in Congress to divest the estate of the decedent from the statutory course of administration, or the money paid was no part of the estate of Jacob Clement, deceased."

I think the latter proposition is defective in stating that the intent was futile for want of power to divest the estate of the decedent. If the award were a gift to the next of kin, then it was no part of the estate of Jacob Clement which they were to receive, but the words "next of kin" were used to designate the persons to whom the award should pass.

The difficulty, which proved an unsurmountable obstacle to the holding that the award should be treated as a gift to the living next of kin of Jacob Clement,

arose from the fact that the duties of the executors were held to relate only to the estate of Jacob Clement, to distribute his estate, and not to act as trustee for the next of kin.

If A should give a sum of money to the next of kin of B, to be distributed as a part of B's estate equally among his next of kin, would the administrator be justified in paying it over to the devisees of B? Congress designates who shall receive the sum. It shall be the personal representative of the original sufferer; but Congress goes further, and says that he shall pay it over to the next of kin. The personal representative of the original sufferer, having received the award under the provisions of the act of 1891, cannot divert it from those for whom Congress intended it by virtue of any state law, as in this matter the law of Congress must be held to be supreme, and the legal representative who receives the award becomes a trustee for its distribution in accordance with the act of Congress.

In *In re Leffingwell Estate*, 62 Conn. 347, the court said, —

> "It is contended that the proviso to the appropriation is indicative of an intent to make a direct gift to the next of kin of William Leffingwell, the original claimant. If this be so, either the intent was futile for want of power in Congress to divert the estate of a decedent from the statutory course of administration, or the money paid was no part of the estate of William Leffingwell, deceased. If the latter proposition can be sustained, and it necessarily results from regarding the fund as a direct gift to the living next of kin, and not as accruing from the payment of a debt due to their ancestor, then Oliver S. White re-

ceived it as trustee for the persons described as next of kin of William Leffingwell, and not in virtue of his office as administrator, and the probate court had no jurisdiction to distribute the gifts. But the proviso is as clearly evincive of an intent that the money appropriated to pay this claim to Mr. White in his capacity of administrator as is the language itself. While the clause, 'the award, in case of individual claimants, shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin,' standing alone, would indicate that the money was intended to be a gift to the person described, and that by 'personal representatives' was not meant 'representatives' of the decedent, but the representatives of the donees of Congress, the succeeding member of the sentence leaves no doubt that legal representatives of decedents — executors and administrators — were intended to be the recipients, and upon trusts declared and appointed by the law of their testator's or intestate's domicile.

"They were to be persons to whom administration had been granted, and by whom security had been given. The courts of Connecticut, within meaning of the proviso which grants administration, are the courts of probate in the respective districts. They have power to take security for the administration of decedent's estates according to the laws of Connecticut, and not otherwise, and have not power to take security for the execution of trusts over which the court of probate has no jurisdiction. The power and jurisdiction of these courts may be presumed to have been known to Congress, and therefore, when it re-

> quired the Secretary of the Treasury to be certified by them, 'that the legal representatives have given adequate security for the legal disbursement of the awards,' it must be presumed to have intended such security as they could take and certify. Requiring, then, as a condition precedent to the payment of the award, that the administrator should have given security as such, according to the laws of Connecticut, for the legal disbursement of the same, it must have been intended that the disbursement should be in accordance with the conditions of that security, namely, to the persons who were entitled to participate in the distribution of the estate upon which the administrator was acting. These are the persons who are described in the act as the next of kin."

The position taken by the court in this case, as stated in the foregoing quotation, is that the executor must distribute the estate in accordance with the provisions of his testator's will, and those persons to whom he has bequeathed his property are his next of kin.

This, I respectfully submit, is a forced construction, not warranted by the language of the act, and, for reasons I have heretofore advanced, not consistent with the act of Congress now under consideration.

The construction in this last case, as in *Clement's Case*, *supra*, is made to bend to the laws of the respective states for the administration of estates, and, because the administrator was bound to distribute his testator's estate in accordance with the terms of his will, that therefore the award must be treated as the testator's estate.

The testator could direct how all the estate of which he died possessed should be distributed, and the administrator must comply with such direction. But

where an award is the creation of the law, and, according to the doctrine stated in *Williams* v. *Heard*, *supra*, no right existed to the sum awarded until after an act of Congress, then the power which creates the award certainly has the power to direct the disposal of it.

If the executor is to distribute the award as if it had been a part of the estate of the original sufferer, he must, nevertheless, distribute it as directed by the act of 1891. He must pay it over to the next of kin.

The act provides that in case of individual claimants they *shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin*, and the court which granted the administration respectively shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards.

As an administrator of an intestate represents the next of kin, the language italicised has marked significance; because, if a testator had bequeathed all the residue of his estate, after some small bequests which had been paid, to a stranger or to a charitable institution, such as foreign missions, then the next of kin would not be represented by the administrator. The word "next of kin" must be construed as used in its well-known legal sense, meaning those who at the time of the act were nearest in blood to the original sufferer.

The act deals with the present, and not with the past. It does not provide that the award shall be distributed as the estate of William Gray.

But it provides that it shall be paid to the next of kin to William Gray. The language of the entire act discloses the fact that Congress did not desire the

award to be distributed as the estate of the original sufferer under any will which he might have executed, but as an award to the next of kin of the original sufferer.

If it had been the intention of Congress to distribute the award to the next of kin of the original sufferer at the time of his death, why did it require a certification to the Secretary of the Treasury "*that the personal representatives on whose behalf the award is made represent the next of kin?*

If the sufferer had diverted the residue of his estate from his nearest blood relation to a stranger, and the stranger held all the estate, why should such stranger, when claiming the award which he would have a right to claim if it were a part of the estate of the original sufferer, be certified as representing the next of kin?

Under such conditions the next of kin would not receive the award. It would be the property of the stranger under the will.

In the case at bar, William Gray bequeathed and devised the residue of his estate to his five sons, and if the award be treated as part of his estate, then it passed by his will to his residuary legatees; and if it passed to them, then they had a right to it, and their representatives, and not the representatives of William Gray, senior, were entitled to receive it.

In this case two of the five residuary legatees died without issue, but testate. Now who is to receive the award; the next of kin of William Gray at the time of the act of 1891, or the residuary legatees of William Gray? If the award be a part of the estate of William Gray, to be considered as his estate at his death, then the persons entitled to it are not the next of kin of William Gray now living, but those who were next of kin and his residuary legatees at his death.

If, as held in *Leffingwell's Case*, *supra*, the next of kin are those who were entitled to participate in the estate of the original sufferer at the time of his death, this construction would exclude the daughter of William Gray and her descendants from being considered next of kin to William Gray, and preclude her descendants from any part of the award now held for distribution, as they would not be considered as next of kin; and that notwithstanding they might be nearer in blood than any living relative of William Gray; and therefore the representatives who received the award could not be held to represent her or her descendants. The fact that the person who receives the award must represent the next of kin, I submit, is conclusive of the intention of Congress to bestow the award upon those who were next of kin at the passage of the act of 1891.

The medium of distribution was established by Congress to be an administrator of the fund awarded, who should be subject to all the liabilities that would have attached if he had held the fund directly from subsequently acquired assets of the estate of the original sufferer. As to how far, under the peculiar terms of the act, the administrator, strictly as administrator, might be liable to the next of kin it is not now necessary to inquire. The intention of Congress is the only pertinent question that now demands consideration.

That intention is made evident when the entire act, and the historical facts connected with the subject matter of the award, are taken into consideration; and I trust that this court will have no difficulty in determining that those who were next of kin to William Gray on the 3d of March, 1891, are entitled to the award.

The leading case, and I may well say the controlling case, in *Balch* v. *Blagge*, *supra*, and in *Leffingwell's Appeal*, 62 Conn. 347, was *Clement's Estate*, re-

ported in 150 Pa. St. 85, concerning which I have already commented. ANDREWS, C.J., in delivering the opinion in *Leffingwell's Appeal*, *supra*, said, in reference to *Clement's Estate*, *supra*, —

> "A very clear and cogent argument, we have followed the general outline, and to a considerable extent the language of that opinion as expressing our own views."

The Supreme Judicial Court of Massachusetts, in *Balch* v. *Blagge*, *supra*, as also in the case at bar, followed the case of *Clement's Estate*, *supra*, and it was the foundation upon which the Supreme Judicial Court of Massachusetts formulated and promulgated its opinion in these two cases. The case of *Clement's Estate* has been reheard and overruled.

The Supreme Court of Pennsylvania, all the justices of that court being on the bench, in its unanimous opinion published March 26, 1894, and reported in 160 Pa. St. 391, Mr. Justice MITCHELL, speaking for the court, says, —

> "This case has suffered from its intricacy and its unusual character. The important facts require to be briefly restated. The act of Congress of 1891 awarded to the administratrix of Jacob Clement, on account of his losses by the French spoliations, two sums, the net proceeds of which constitute the fund now in court for distribution. At the date of the act Jacob Clement was, of course, dead, and all his children were dead. There were living, however, four grandchildren, children of a son, Samuel, and thirteen great-grandchildren, issue of seven deceased children of a daughter, Mary English. The questions to

be determined were, who were the next of kin meant by the act of Congress, and in what proportion were they to take?"

"Grandchildren were the nearest in blood to Jacob of any of the parties living, and the learned court below treated all the grandchildren living and dead as a class of *propositi*, those living taking *per capita* in their own right, and the issue of those dead taking *per stirpes* in the right of their parents.

"From the distribution made in accordance with this view, the four living grandchildren appealed, claiming, first, that next of kin in the act of Congress meant nearest in blood, according to the common law, and therefore that the four living grandchildren were entitled to the whole of the fund, to the exclusion of the descendants of those deceased; and secondly, the appellants claimed that, if the principle of representation should be recognized at all, it should begin a step farther back, with the children of Jacob; and as there were but two children, a son and a daughter, who had living representatives at all, the four grandchildren who were the children of the son should take one half of the fund, instead of four elevenths, which they got under the view of the Orphans' Court. Neither of these contentions was specifically sustained, but the decree was reversed on the grounds, somewhat too broadly expressed, that the act of Congress contemplated a succession of next of kin from the person himself on whose account the award was made, and that therefore the fund should be distributed as part of Jacob Clement's estate. The case thus decided is reported as *Clement's Estate*, 150 Pa. St. 85.

"The learned court thereupon proceeded to

open the case and ascertain the course of devolution of Jacob Clement's actual estate, and dispose of the present fund in the same way.

"From the distribution accordingly made, the present appellants, great-granddaughters of Jacob Clement, were entirely excluded, because, under the will of their grandmother, Mrs. English, her residuary estate went to her five children living at her death.

"The assignment of errors to this exclusion brings up the whole subject anew of the intent of the act of 1891, as to the persons who were to take, and their proportionate shares."

"Further consideration and better acquaintance with the whole case have convinced us that our first views as expressed in 150 Pa., *supra*, are not sustainable, and that the case must be overruled.

"The fund was a pure gratuity from Congress, though it had a moral claim back of it that was the moving force of the gift.

"It is a part of the public history of the country that for more than three quarters of a century the claims had been pressed, both houses of Congress had twice recognized them, though Presidents Polk and Pierce had vetoed the acts, and the general consensus of jurists and historians had settled down into a conviction that the claimants had been wronged by acts admitted by the French government to give rise to valid obligations to make reparation; that the United States had yielded their rights of reclamation from France, and that the refusal or delay in making payment of the obligations thus become a duty had long become a reproach to the national good faith.

"In 1885 Congress again took up the subject, and this time, the President concurring, passed an

act to authorize the Court of Claims to 'examine and determine the validity and amount of the claims . . . together with their present ownership, and, if by assignee, the date of the assignment, with the considerations paid therefor.'

"But this was to be merely an advisory report for the information of Congress, and it was expressly enacted that 'nothing in this act shall be construed as committing the United States to the payment of any such claim.'

"The Court of Claims having favorably reported on the claim of Jacob Clement, Congress passed the act of March 3, 1891, 26 Stat. at Large, 897, under which the present fund was received by the accountant.

"By this act the money was awarded to Mary B. Scott, administratrix *de bonis non* of Jacob Clement, and it was provided that, 'in all cases where the original sufferers were adjudicated bankrupts, the award shall be made on behalf of the next of kin, instead of to the assignees in bankruptcy; and the awards in the case of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations respectively shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards.'

"This, as already said, was a pure gratuity.

"There was no right in any one which could be enforced, or which had any recognition at all in law.

"Congress, therefore, in making the gift, were free to make it to whomsoever they chose, and

upon whatsoever terms. It was made to the next of kin, and the intent that it should go to them in their own right as standing in the place of the original claimant, is apparent throughout this act, as well as the preliminary act of 1885.

"Assignees in bankruptcy were expressly excluded, and the personal representatives were not to get the money until it should be certified to the Secretary of the Treasury that they represented the next of kin.

"By unquestionable implication, all other parties, assignees, devisees, residuary legatees, widows, surviving husbands, etc., are also excluded.

"The right to the fund accrued in 1891 to those who were the next of kin.

"That was the inception of the right, and those who were then dead never acquired any interest of any kind in the fund, and of course could transmit none by will or otherwise.

"It never was, in fact, part of Jacob Clement's estate, nor his children's, nor his grandchildren's who died before 1891. Nor was it the intent of Congress it should be so considered. For if it was first made *de jure* a part of Jacob Clement's estate, then the power of Congress to shut out the vested property rights of assignees, creditors, and others whose claims upon the estate were fixed by law, would be at least extremely doubtful.

"There was not only no such intent, but such construction was carefully guarded against."

The Supreme Court of the District of Columbia, in the case of *Gardiner, Adm'r*, v. *Clarke, Adm'r*, 20 Washington Law Reporter, 2, heard before the Chief Justice and Mr. Justice Cox, and Mr. Justice James.

Mr. Justice Cox, in delivering the opinion of the court, among other things said, —

> "The bill in this case is filed for the purpose of having the court determine the proper distribution of one of the French spoliation awards, under chapter 540 of the laws of the second session 51st Congress, entitled 'An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 3, 1891, and for prior years, and for other purposes."
>
> 26 U.S. St. at L. 862.

The act further provides —

> "That the court shall examine and determine the validity and amount of all the claims included in the description above mentioned, together with the ownership, . . . and they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor."

Section 6 says, —

> "Such findings and report of the court shall be taken to be merely advisory as to the law and effects found, and shall not conclude either the claimant or Congress.
>
> "In other words, Congress submitted these claims to the Court of Claims for its advice as to the law and the facts, but expressly reserved the right to follow or disregard the court's advice as they might think proper. And that Congress

declined to follow the advice of the court to its full extent is perfectly apparent.

"The Court of Claims held in substance that the government of the United States in regard to these claims within the constitutional provision for taking private property for public use, and that Congress was bound under this provision to pay to the claimants what was fairly due on their claims that had been sacrificed in the manner mentioned.

"This would make the claim in the hands of the original claimants transferable and transmissible, like all other personal property of the nature of choses in action. If Congress had concurred in the finding of the court as to the law, it would follow that, if any original claimant had been a bankrupt, his assignee would be the party entitled to receive the award. But in appropriating for the payment of awards, Congress has expressly provided that in case of bankruptcy the award should be made to the next of kin, instead of the bankrupt assignee, thus ignoring the incident of ownership which the Supreme Court had held to attach to valid claims which had been recognized by the government. Again, if these were valid claims as held by the Court of Claims, they would pass by a voluntary assignment by the claimant or by his will, and would be assets in the hands of his personal representatives for the payment of his debts. But Congress says that the award shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behoof the award is made represent the next of kin. In other words, Congress says that the money shall not be paid to the executor or administrator for the benefit of cred-

itors, or to assigns or legatees, but only to the next of kin, which involves no recognition of legal property in the award of the original claimant.

"Now it is obvious that Congress has placed these claims on a very different footing from those which we have before spoken of, as to which it has been held that money appropriated generally for their payment takes the same course as the other estate of the claimant. Congress has chosen to give this money a different direction. It may be said that there is no reason why Congress should prevent a claimant from bequeathing his claim to his own family, as was done in this case, by a general bequest by Gardiner of his estate. But if this might be done, he might also bequeath to a stranger, and if this right were conceded, it would be difficult not to concede all the other incidents of ownership, such as the right of assignment *inter vivos*, and the rights of creditors.

"It is somewhat like the case of an appropriation to the widow or children of a decedent on account of meritorious services rendered by the latter, which were yet not recognized as giving a legal claim. It is not unlike, in principle, the legislation which gives to the administrator of the person whose death has been caused by the negligence of another a right to recover damages for the injury, but confines the distribution of the damages recovered to the family of the deceased, instead of allowing them to go into his estate for the benefit of creditors.

"Now if Congress has not appropriated this money to the parties really entitled to it, it follows that their claims have not been satisfied by the appropriation, and still remain unsettled. But

this is not money received for the use of these claimants. It is the money of the United States which Congress could appropriate as it thought proper, and the court have no right to divert the appropriation from the parties in whose favor it was made to others to whom they might think it ought to have been given. We can only determine to whom it was given, and we have no difficulty in reaching the conclusion that it was intended for the benefit of those who were next of kin to the deceased original claimant at the time the award was made."

I now respectfully submit upon both principle and authority that the amount in controversy should, under the act of March 3, 1891, be distributed among those who were the living next of kin to William Gray when that act went into force, and, as appears in the Record (pp. 6, 7), by the genealogical table inserted between pages 6 and 7, marked page 10, ten nineteenths of the living next of kin to William Gray when the act of March 3, 1891, went into effect, claim through Henry Gray, and therefore they are entitled to ten nineteenths of the amount in controversy.

## POINT FOURTH.

*And in conclusion I respectfully submit that the decree of the Supreme Judicial Court of Massachusetts should be reversed.*

HARVEY D. HADLOCK,
*of Counsel for Plaintiffs in Error.*
WILLIAM GRAY BROOKS,
*also of Counsel for Plaintiffs in Error.*

# Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 284.

WILLIAM GRAY BROOKS,

ADMINISTRATOR OF THE ESTATE OF HENRY GRAY, *et al.*,

*Plaintiffs in Error,*

v.

ROBERT CODMAN,

ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE NOT ALREADY ADMINISTERED OF WILLIAM GRAY THE ELDER, *et al.*

# BRIEF

FOR ADMINISTRATOR OF ESTATE OF WILLIAM R. GRAY, ADMINISTRATOR OF ESTATE OF FRANCIS C. GRAY, EXECUTORS OF WILL OF JOHN C. GRAY, AND ASSIGNEES OF HORACE GRAY, DEFENDANTS IN ERROR.

## Statement of the Case.

This case is before the court on a writ of error to the Supreme Judicial Court of Massachusetts. It arises on a bill in equity, of the nature of a bill of interpleader, brought by the administrator with the will annexed of the estate of William Gray, asking the instruction of the court regarding the distribution of the sum of $122,983.03 (less deductions),

which sum has come into the plaintiffs' hands through the appropriation made by Congress for the payment of losses suffered by William Gray by reason of the French spoliations.

The appropriation was made to William Gray, Jr., as administrator with the will annexed of the estate of William Gray, and the bill in this cause was originally brought by him, but on his death pending the cause, Robert Codman succeeded to the administration, and was substituted as plaintiff (p. 12). All the living legatees and next of kin, and the representatives of such as were deceased, were made parties respondent.

The main question raised by the bill is whether the fund shall be paid over as a part of the estate of William Gray, passing to the legatees under his will, or be paid over to his next of kin on the ground that the act of Congress so prescribes. If paid to the next of kin, it is also in question whether they are to be determined as of the time of the death of William Gray, or as of some other time.

William Gray died in 1825, leaving five sons, William R., Henry, Francis C., John C., and Horace (the elder), and one daughter, Lucia G. Swett. A table showing his descendants is given in the record (p. 6). He left a will (p. 20), by which, after a specific legacy to the daughter and a conditional legacy to each son, he gives the residue to his five sons, excluding the daughter. As the specific legacy to the daughter has been satisfied (p. 5), and the conditional legacies to the sons either have been satisfied or are now inoperative, and nowise enter into this present case, the fund in question, if it belongs to the estate at all, is confessedly a part of the residue, and the daughter has no interest in it.

In 1829 one of the sons, Henry, assigned his interest in his father's estate to his four brothers (p. 21).

In 1847 another of the sons, Horace (Sr.) assigned all his property by mesne assignments to Robert Hooper, W. E. Coffin, and W. S. Bullard, as assignees for creditors, and of these assignees the last two survive, and are parties to this proceeding. The administrator of Horace admits this assignment by his answer (p. 9), and makes no claim in opposition.

The positions taken by the parties are as follows: —

The representatives of the three brothers, William R., Francis C., and John C., and the assignees of Horace (the elder), contend that the fund passes by the will of William Gray, and should be wholly paid to them in equal portions, as representing four of the five residuary legatees, and as being assignees of the fifth, Henry, under his assignment above referred to. The individual descendants of the brothers, except those of Henry, make no contrary claim, but by their answers either take the same position or admit the allegations of the bill, and submit the questions to the court (pp. 11, 23). The representative and descendants of Henry Gray, however, contend (p. 15) that the fund does not pass under the will, but is a new and subsequent gift directly in favor of the next of kin of William Gray, it being for their interest to take this position in order to escape the consequences of Henry Gray's assignment; and the representative and descendants of Lucia G. Swett, who was excluded from the residuary legacy of the will, take the same position (p. 26).

By the decision of the state court (p. 32), the fund was held to pass under the will, and the administrator of William Gray was directed to pay it over accordingly. *Codman* v. *Brooks*, 159 Mass. 477. The correctness of this decision is maintained by the representatives of William R., John C.,

and Francis C., and the assignees of Horace (Sr.), and on their behalf this brief is filed. The descendants of the brothers, except those of Henry, do not file briefs, but simply submit the case to the decision of the court.

The assignment of errors (pp. 33, 34) shows that, in addition to the main question regarding the distribution of the fund, the administrator and descendants of Henry Gray assign certain errors respecting the assignment made by Henry Gray, which the court held to be valid, and to operate to transfer Henry Gray's interest to his four brothers. The subordinate question thus raised concerning this assignment will be considered at the end of this brief.

## I.

The contention that the money appropriated to satisfy the French claims does not belong to the legatees of the original owner of the claims must rest on some express requirement, which the next of kin maintain is to be found in the appropriation act. As any ambiguity in that act must be interpreted, however, in the light of the history and character of the claims, and of the previous legislation concerning them, we will consider these before discussing the precise language of the act. The question being wholly one of the intention of Congress as to the persons to whom the money should be paid, it is necessary to determine at the outset what demand it was that Congress meant to pay.

We contend that the claims with which Congress was dealing actually belonged, upon the principles and authorities recognized in courts, to the estates of the original claimants, and that to divert the money from the owners of these estates demands a clear direction in the act of Congress, every presumption being against such a diversion.

The history of these claims is well known. The main facts and arguments are set out in many reports to Congress, of which the report of Mr. Sumner, made to the Senate in January, 1870, may be as complete and as accessible as any. (Sen. Rep. No. 10, 41st Cong. 2d Sess.)

They are also conveniently stated in the report of *Gray's Case*, 21 Ct. Cl. 340. It will be enough here to give the briefest epitome.

By the two treaties, that of "alliance" and that of "amity and commerce," made between the United States and France in 1778, our government agreed, among other things, to aid France in any war with Great Britain, and gave her special and exclusive privileges in the use of our ports for prizes, etc. During the Napoleonic wars our government refused to comply with the French demands for a performance of the treaties, but, on the contrary, made a treaty with Great Britain repugnant to its engagements with France. A state of inflamed feeling ensued which led to many aggressive acts by France, and in particular many of our ships were seized on insufficient pretexts and condemned as prizes. The losses thus incurred by our citizens our government seems expressly to have recognized in 1793, and it undertook to procure satisfaction.

The grievances between the two countries were the subject of bitter discussion, followed by protracted negotiations, and, after many unsuccessful attempts, a treaty was concluded in 1800. By this treaty, France released the United States from all claims under the treaties of 1778, in consideration of a release from the latter of all claims growing out of the injuries inflicted on our shipping.

Our government having thus, for a valuable consideration enuring to itself, disposed of the claims of its individual citizens, the latter demanded compensation for their property so

appropriated, and these are the French spoliation claims which for nearly a hundred years have been pressed upon Congress.

The obligation of our government to reimburse its citizens for their extinguished demands against France has always been rested on grounds of legal right, as far as there can be such a right against a sovereign power. The validity of the claims in their new form, as claims against our government, was admitted by those who had contemporary knowledge of the events.

Mr. Madison said, —

> "The claims from which France was released were admitted by France, and the release was for a valuable consideration in a correspondent release of the United States from certain claims on them."

Mr. Pickering said, —

> "It would seem that the merchants have an equitable claim for indemnity from the United States. . . . The relinquishment by our government having been made in consideration that the French government relinquished its demands for a renewal of the old treaties, then it seems clear that, as our government applied the merchants' property to buy off those old treaties, the sums so applied should be reimbursed."

Chief Justice MARSHALL said, —

> "Having been connected with the events of the period, and conversant with the circumstances under which the claims arose, he was, from his own knowledge, satisfied that there was the strongest obligation

> on the government to compensate the sufferers by the French spoliations ; " —

and he repeated —

> " that the United States ought to make payment of these claims."

It appears that, at the session of Congress first succeeding the ratification of the treaty of 1800, memorials asking for payment were presented by the merchants of Baltimore, Philadelphia, Alexandria, Massachusetts, New York, Virginia, Connecticut, North Carolina, South Carolina, and the District of Maine. These were followed in successive years by a continuous stream of petitions, repeatedly brought before Congress, and pressed with unremitting importunity, down to the time of action by Congress in 1885.

Every one of the original thirteen states of the Union has declared, by resolution, that the claims ought to be paid. Forty-eight reports on the subject have been made by committees of Congress from 1802 to 1885. Of these, forty-five assert the validity of the claims as against our government, and this view has been sanctioned by Clay, Clinton, Edward Livingston, Everett, Webster, Cushing, Choate, and Sumner, in addition to those named above, and many others.

The legal character of the claims was thus summed up by Senator Livingston, with all the weight of a contemporary authority, in his report to the Senate :

> " The committee think it sufficiently shown that the claim for indemnities was surrendered as an equivalent for the discharge of the United States from its heavy national obligations, and for damages that were due for their preceding non-performance of them. If so, can

there be a doubt, independent of the constitutional provision, that the sufferers are entitled to indemnity? Under that provision, is not this right converted into one that we are under the most solemn obligations to satisfy? To lessen the public expenditures is a great legislative duty: to lessen it at the expense of justice, public faith, and constitutional right would be a crime."

It was in 1826 that Mr. Clay, in making his favorable report, for the first time published the correspondence bearing on the subject. There have been but three adverse reports from the beginning down to the act of 1885, and each of these was prior to Mr. Clay's publication of the correspondence. The Senate has passed eight bills for the payment of the claims, of which the House has also passed three. Of these three, one was vetoed upon grounds not involving any doubt of the validity of the claims, and one was vetoed upon grounds squarely at variance with the position taken by all the contemporary, and by the great preponderance of the later, authorities.

Mr. Webster, in a speech made in the Senate on January 12, 1835, used this language:

"Before the interference of our government with these claims they constituted just demands against the governments of France. They were not vague expectations of possible future indemnity for injuries received, too uncertain to be regarded as valuable or to be esteemed as property. They were just demands, and as such they were property. The courts of law took notice of them as property. They were capable of being devised, of being distributed among heirs and next of kin, and of being transferred and assigned like other legal and just debts.

"The papers show that American citizens had claims against the French government for six hundred and fifteen vessels unlawfully seized and confiscated. If this were so, it is difficult to see how the government of the United States can release these claims for its own benefit with any more propriety than it could have applied the money for its own use if the French government had been ready to make compensation in money for the property thus illegally seized and confiscated; or how the government could appropriate to itself, without making just compensation, the just claims which the owners of these six hundred and fifteen vessels held against the wrongdoers, any more than it could appropriate to itself, without making compensation, six hundred and fifteen vessels which had not been seized. I do not mean to say that the rate of compensation should be the same in both cases; I do not mean to say that a claim for a ship is of as much value as a ship; but I mean to say that both the one and the other are property, and that government cannot, with justice, deprive a man of either, for its own benefit, without making a fair compensation.

. . . "I believe the claims to be as just as were ever presented to any government. I think they constitute an honest and well-founded debt, due by the United States to these claimants."

IV. Webster's Works, pp. 159, 178.

It cannot be necessary to re-argue the question of the government's liability to pay these claims. That has been passed upon by the Court of Claims in an exhaustive decision which has been approved by Congress. It is enough now if we have made it clear that the claims, from their be-

ginning down to the time when Congress sent them to the Court of Claims in 1885, were asserted on the ground of legal right, not as requests for a bounty, or mere grievances which might appeal to sympathy.

II.

The claims being persistently pressed, and always on the high ground of right, how were they finally met by Congress? It would possibly have been open to Congress to refuse any discussion of their legality, and to get rid of the claimants by an off-hand donation sufficient to stop the clamor, though having no relation to the specific amounts demanded. Instead of this, Congress determined upon an exact investigation of the legal position of the claimants, and of the exact character and amount of each claim, to be ascertained according to rules of law, and for this purpose they sent the claimants to a court of justice, though reserving the right to decide, after being informed of the facts, whether they would or would not satisfy the demands.

By the act of 1885 (23 U.S. St. at Large, 283), entitled "An act to provide for the ascertainment of claims of American citizens," etc., it was enacted that "such citizens of the United States as had valid claims to indemnity upon the French government . . . many apply by petition to the Court of Claims," etc. "The court shall examine and determine the validity and amount of all the claims included within the description above mentioned, together with their present ownership, and if by assignee, the date of the assignment, with the consideration paid therefor; . . . and they shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States there-

for." The Attorney General of the United States is directed to "resist all claims presented under this act by all proper legal defences." By section 6 the court is to report its findings to Congress "for final action." Such report "shall be merely advisory as to the law and facts found, and shall not conclude either the claimant or Congress; . . . and nothing in this act shall be construed as committing the United States to the payment of any such claims."

Certainly the object of this act is not investigation preliminary to the bestowal of bounty, but it is a plain direction to treat the claims on legal grounds, ascertain the *ownership*, and report accordingly.

The Court of Claims entered upon the investigation, each claim being separately presented, prosecuted, and defended as in the case of any suit at law. The government from time to time made appropriations for enabling the State Department to procure evidence "affecting the rights or claims of American citizens under the act" of 1885, "to be used by the Attorney General before the Court of Claims," etc. (23 St. at Large, 446; 24 St. at Large, 238, 525; 25 St. at Large, 566; 26 St. at Large, 505), and also appropriations "to enable the Attorney General to make proper defence for the United States in the matter of the French spoliation claims (24 St. at Large, 253, 540; 25 St. at Large, 544, 976; 26 St. at Large, 408, 883, 985).

William Gray, Jr., having procured an appointment as administrator with the will annexed of his grandfather, William Gray, Sen., presented his claim to the court, submitted his proofs, and tried and argued his case. Finally the court, after an exhaustive examination into the history and legal standing of the claims, made its first report to Congress, selecting Mr. Gray's case for the announcement of

its general conclusion. The court thus disposes of the legal character of the claim (*Gray's Case*, *supra*) :

> "The citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere is given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his government. It seems to us that this bargain (again to use Madison's words) by which the present peace and quiet of the United States, as well as their future prosperity and greatness, were largely secured, and which was brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution which prohibits the taking of private property for public use without just compensation."

See, too, *Holbrook's Case*, 21 Ct. Cl. 434.
*Cushing's Case*, 22 id. 1.

Some of the language of the Court of Claims in *Cushing's Case*, *supra*, and *Buchanan's Case*, 24 Court of Claims, 74, has been sometimes referred to as indicating that the claims were not considered as having the full measure of legal demands; but everything of that character there said plainly refers solely to the impossibility of enforcing them by suit against the government, and of course there is always that feature in such claims. There is nothing in any decision of the Court of Claims to impair the position announced in *Gray's Case*, that, so far as the character of the demands goes, they stand strictly as of right, though of course dependent upon Congress for recognition.

The specific conclusions of fact reached by the Court of Claims in the case of each claim were separately reported to Congress in a form of which a copy is set out in the record, giving the facts reported in the case of William Gray's claim for the capture of brig "Minerva" (p. 27). By this report it is found "that the claimant is entitled to the following sums from the United States," etc.

Upon receiving reports from the court, Congress took its final action by passing the act of 1891 (26 St. at Large. 862, 897). By this act money is appropriated "to pay the findings of the Court of Claims on the following claims for indemnity for spoliations by the French," under the act of 1885; and then follow the specific items, including the several items in favor of William Gray, administrator.

The findings of fact and conclusions of law thus reported to Congress, including the final decision "that the claimants are entitled to the following sums from the United States," must be taken as the actual and declared basis of the appropriation act. In addition to the weight and authority attaching to them as decisions made by the tribunal selected by the government itself, reached after a thorough examination of the subject, and in spite of "all proper legal defences" interposed by the Attorney General, these reports have this final and conclusive force, that they are adopted by Congress, and in effect incorporated in the appropriation act.

It is not, therefore, now open to contend that Congress viewed the claimants as recipients of a mere bounty or gratuity. Congress has itself declared the contrary. The grounds on which it acknowledged and decided to pay the claims are bound up with the appropriation, are a part of it, and stand proclaimed by Congress as the reason for payment, and no other reason can be imputed.

## III.

That claims against the government, if based on definite rights, have all the incidents of claims strictly legal, excepting that of being enforceable in the courts, is abundantly settled in this as well as in other courts. Although the difficulty of suing the government without its consent fastens so much of peculiarity on such claims as to prevent their being spoken of strictly as legal causes of action, yet in all collateral respects, and for all purposes other than remedy, they are treated as legal obligations, having the same incidents of ownership, transferability, and descent as attach to a claim between individuals. In order that a claim upon the government should have this full character of property it is only necessary that it should rest upon legal grounds, as contrasted with grounds merely charitable or morally meritorious. In any case, therefore, where the claim if between individuals would have the character of property, a claim of the same nature will have the same character, though it be against the government.

This has been determined and applied in cases where the circumstances were far less conclusive as to the legal basis of right than they are here.

In the case of *Williams* v. *Heard*, 140 U.S. 529, the court held that war-premuim claims, which were paid by Congress, in distributing the total sum awarded by the Geneva tribunal, had the character of property, and passed by an assignment made before Congress had recognized them, although the tribunal had expressly refused to include them in making up its award. The court says, —

> "They were rights growing out of property; rights, it is true, that were not enforceable until after the pas-

sage of the act of Congress for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of the losses having been suffered. All that the act of Congress did was to provide a remedy for the enforcement of the right. The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened. They are descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives, and be distributable as assets, or might have been devised by will, while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personalty. Nor do we think that the money appropriated by Congress by the act of 1882 to pay these claims should be considered merely as a gratuity."

In *Comegys* v. *Vasse*, 1 Pet. 193, a claim against Spain, which our government assumed and agreed to pay by the treaty of 1819, was held to have passed under an assignment made by the owner before the treaty. The court says, —

"There cannot be a doubt that if the party injured had died before or after the treaty was made, and the compensation had been subsequently decreed, it would have been assets, and distributable as such in the hands of executors and administrators."

In *Milnor* v. *Metz*, 16 Pet. 221, a claim on the United States for services as gauger, disallowed by the accounting officers because not provided for by any law, but subsequently required to be paid by special act of Congress, was

held to have passed by an assignment made prior to the act; the court saying, —

> "Had a similar claim on the part of Milnor existed against an individual instead of the government, then there can be no doubt he could have recovered by suit. . . . So it would have passed to his administrator in case of death. As the government was equally bound to do its debtor justice, in a different mode, with an individual, we think no sound distinction exists in the two cases."

In *Erwin* v. *United States*, 97 U.S. 392, a claim against the government for cotton captured by the army and sold, was held to have passed by an assignment in bankruptcy made prior to an act of Congress providing for payment. Here the court said, —

> "Demands against the government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice or favor of the legislature."

In the similar case of *Phelps* v. *McDonald*, 99 U.S. 298, a claim of a British subject for cotton destroyed by the United States army was held to have passed by an assignment in bankruptcy made before the act of Congress providing for its payment; and here the court said, —

> "There is no element of donation in the payment ultimately made in such cases. Nations no more than individuals make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by

> a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. . . . If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re* — possibilities coupled with an interest, and claims growing out of property — pass to the assignee. The right to indemnity for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category."

So, in *Gracie* v. *N. Y. Ins. Co.*, 8 Johns. 237, KENT, C.J., speaking of a claim growing out of the capture of a ship by the French, says, —

> "If France should, at any future period, agree to and actually make compensation for the capture and condemnation in question, the government of the United States, to whom the compensation would in the first instance be payable, would become trustee for the party having the equitable title to the reimbursement."

In *Foster* v. *Fifield*, 20 Pick. 67, the owner of a claim against the king of the Two Sicilies having died, and the money being paid sixteen years later by our government, which had obtained it under a treaty made with the Two Sicilies, it was held that the money was not new assets, but an original part of the claimant's estate. SHAW, C.J., said,

> "It is in the nature of a debt due to the intestate at the time of his decease, but collected afterwards through the mediation of the government."

So, too, in, *Leonard* v. *Nye*, 125 Mass. 455, GRAY, C.J., says of money paid by act of Congress on account of one of the Alabama Claims, —

> "It must therefore be treated as awarded and paid to him by reason of his interest in property so destroyed, and of his right to compensation for its destruction, and is capable of passing by an assignment from him in any form recognized by law, though made after the destruction of the property and before the award of indemnity."

*Randal* v. *Cockran*, 1 Ves. Sen. 98.
*Blaauwpot* v. *DaCosta*, 1 Eden, 130.
*Bachman* v. *Lawson*, 109 U.S. 659.
*Plater* v. *Scott*, 6 Gill & J. 116.

Applying the principle established by the foregoing authorities to the case in hand, we understand that the claim which William Gray, Sen., had in his lifetime against our government was property, in a strict legal sense; that on his death it passed to his representative for the benefit of the residuary legatees under his will; that it belonged to that representative when Congress passed the act of 1885 permitting such representatives to establish their claims in the Court of Claims; that it was determined by the court to be valid and to be owned by William Gray's representative, and was so reported to Congress; that, finally, Congress either intended to pay it by its appropriation in 1891, or intended to leave it unpaid, but outstanding and still valid.

The question now is which of the two alternatives just mentioned Congress intended to adopt. Did it mean to pass an appropriation act which, while dealing generally with these claims, should pay some of them, but leave others

unpaid and outstanding, and this not because of any difference in validity, but because of the character of the ownership in these cases? This it was undoubtedly within the power of Congress to do, and this it expressly did in the case of bankruptcy, though for special reasons. Our position is that to accomplish such a discrimination, there must be a plain direction, and that the presumption is strongly against such a treatment of obligations which are admitted by the act to be binding.

That the claims were actually owned by legatees, within the strictest rules of law, in every case where there had been a will which would cover them, must be taken to have been in the minds of the legislators. Such general principles of law are presumed to be known, and the common law as it existed before the act was passed, is always a chief consideration in determining the meaning of an act.

That Congress deliberately intended to exclude every one who owned a claim by bequest, leaving his claim, though admitted by the very act itself to be a valid and binding obligation, unpaid and without even an encouragement to apply again to Congress, and intended at the same time to give the amount which belonged to him to persons having no possible ownership, and not more deserving on any theory which ever had been, or now can be, suggested, — this is certainly a violent conclusion, to which nothing but express language should force us.

The strong presumption, and natural interpretation, which grow out of the established legal character of the claims, so entirely control whatever of doubt there may be in the imperfectly expressed language of the act that it can only be escaped, in our view, by denying that character wholly, and asserting that Congress meant nothing but to confer a gratuity. On that view it might be argued that Con-

gress, being disposed to confer a bounty in view of the suffering caused by the French spoliations, as it might propose to relieve the effects of a bad harvest, looked about for the persons to whom it should make its gift, rejected all idea of obligation or ownership, and, refusing especially to recognize the wills of the original sufferers, selected their next of kin, passing an act which is to be examined without any presumptive or antecedent probability.

It is this gratuity theory, therefore, which is insisted on by substantially every one who interprets the act to exclude those who own the claims by bequest, since the conclusion that the claims were admittedly valid must almost necessarily involve the conclusion that the owners are to be paid so far as possible.

Of the three state courts which have construed the act as excluding legatees, two have put their decision squarely on the theory of gratuity, — *Gardner* v. *Clarke*, 20 Dist. Col. 261; *Clements' Case*, 160 Penn. 391. The third case, that decided by the Circuit Court of Baltimore city, frankly recognizes the result that "if the real owners have not been provided for, they must look to Congress for a correction of the wrong;" but considers the language of the act as so clear that this result must be accepted. *Carey* v *Morris*, 49 Leg. Intel. 141.

On the other hand, in the cases where the full legal character of the claims, as declared by the Court of Claims, is admitted, the courts have construed the act, chiefly for that reason, in favor of those who own by will.

*Balch* v. *Blagge*, 157 Mass. 144.
*Codman* v. *Brooks*, 159 Mass. 477.
*Leffingwell's Estate*, 62 Conn. 347.
*Clements' Estate*, 150 Penn. 85.
See, too, *Hooper's Case*, 28 Ct. Cl. 480.

## IV.

That Congress admitting the claims to be valid obligations, intended to pay them, appears not only from the general nature of the demands as established by the rules of law, but from the proceedings in Congress which immediately led up to the appropriation act.

The advocates of the next of kin will hardly contend that their view is expressed in the act in language free from ambiguity. The statute being, then, ambiguous, the intention of Congress is to be gathered not only from the general purpose of the act and the state of things then existing (*Platt* v. *U.P. R.R.*, 99 U.S. 48, 60), but the proceedings of Congress and the reports of its committees may be referred to, not, of course, to ascertain the opinions expressed by individual members in debate, but to explain how the embarrassing words were introduced, and to show the general situation which gave rise to the enactment. *Blake* v. *Nat. Banks*, 23 Wall. 307. See, too, *Keymer's Case*, 148 N.Y. 219. It is expressly provided, too, in the report of the court below on which the case was heard, that such matters may be referred to in argument, so far as admissible. (Rep. p. 38.) We propose to refer to them so far as to show that Congress was dealing with the claims as valid demands already established by the Court of Claims, and legally due to ascertained persons, and never contemplated the bestowal of a bounty outside the limits of declared obligation.

The first report of the Court of Claims to Congress, that in Gray's case, was made in 1886. In 1887 the Attorney General recommended that an act be passed conferring authority upon the Court of Claims to render strict judgment for the amounts due, instead of reporting to Congress, and granting to either party in each case the right of appeal to

the Supreme Court of the United States. (Ex. Doc. No. 7, 50th Cong. 1st Sess.) This certainly sufficiently declares the position of the law department toward the claims as matters asserted and to be disposed of strictly as of right. This suggestion was referred to the Judiciary Committee of the House, which reported adversely, and recommended dealing with the matter at once in Congress, where the claimants who had successfully passed through the Court of Claims had a right to expect satisfaction. A minority report attacked the soundness of the findings of the Court of Claims, especially on the question of the existence of a war between France and the United States in 1798–1800, but expressly recognized the strict legal character impressed on the claims by the findings of the court, and there is nothing in either report to countenance a different view.

No action was taken in this session toward paying the awards.

In the second session of the 50th Congress a report was made by the committee on claims, recommending payment. As this report was adopted and reported in the first session of the 51st Congress, and again in the second session of the 51st Congress, when the act in question was passed, and is therefore the report on which legislation was finally taken, it is worth while to notice the grounds on which it was recommended. (Ho. Rep. No. 4151, 50th Cong. 2d Sess.; No. 558, 51st Cong. 1st Sess.; Sen. Rep. No. 2320, 51st Cong. 2d Sess.) We take these extracts from that report:

> . . . "This [the act of 1885] was not merely a reference of abstract questions: it was a reference of cases upon which severally, year by year, the court was to report to Congress, as these cases were tried, thus

making manifest the intention to recognize them as valid if the court should so decide. This is made still more apparent when it is considered that the act further provided for the sending abroad of a commissioner to procure evidence to be used alike by the claimants and by the government, which further indicates that it was not a decision alone of an abstract question, but the trial of cases which was contemplated in the reference.

. . . "While the act does not say so in terms, but reserves to Congress the right finally to act in the premises, yet there is in this act a clear implication of the intention of Congress to pay them, and on the faith of this the claimants have proceeded in that court. The questions involved have been elaborately discussed in that court. Every conceivable argument against the liability of France and against the liability of the United States has been advanced and urged by the counsel for the government. The court, chosen by Congress as the tribunal to which to submit these questions, has decided against the contention of the government.

. . . "The question of liability has been most fully and elaborately argued and reargued on behalf of the United States, and yet the court has decided that there are some of these claims for which the United States is liable. . . . The situation which confronts Congress is whether this limited number, so reduced in amount, which have been found by the Court of Claims to be valid legal liabilities of the United States, shall be paid or whether they shall be repudiated.

"After having thus submitted these claims to the court as an aid to Congress in the discharge of the political duties of Congress, and after having thus induced these claimants to prosecute their claims before

that tribunal, it would seem to be too late for Congress now to be further contesting the obligation of the United States to pay them. It is reasonably certain that if the court had decided against liability, Congress would have accepted that decision as conclusive."

The report of the committee of the Senate which accompanied the bill as it finally passed, besides adopting the report from which extracts are given above, uses these words (Sen. Rep. No. 2320, 51st Cong. 2d Sess.):

"Congress has sent these claimants to the Court of Claims, and thus used the judiciary in the investigation of law and fact bearing upon the liability of the United States, and in the presentation of their cases they have necessarily incurred very heavy expenses. Had that decision been adverse it would necessarily have concluded the rights of these claimants, and, since it is against the government, we must look rather to those decisions than to our own *ex parte* investigations for the information and authority upon which we should act in the discharge of the duties devolved upon us. These decisions, as stated, are the unanimous judgment of the court. They are full and convincing, and seem to be conclusive of the obligation of the United States as to certain of the claims which arose prior to September 30, 1800, as reported favorably by the court to Congress."

Besides the three favorable reports referred to, perhaps mention should be made of the fact that the appropriation committee of the House reported adversely in the 50th Congress, 1st Sess. (Rep. No. 2961), and again in the 51st Congress, 1st Sess. (Rep. No. 3121). These reports attack the

conclusions reached by the Court of Claims, and seek to reopen the question of the existence of a war with France, and other points, all of which had been expressly decided by the Court of Claims. There is nothing in either report which puts the discussion on the grounds of the merit of an appeal for gratuity, but, on the contrary, both recognize that if the findings of the court are accepted, the claims stand as legally due.

It is a noticeable thing (on which we shall comment later) that nowhere in any report or debate is there a suggestion of any distinction between legatees and next of kin, but the claims are always dealt with, either expressly or by implication, as owned by the representatives whose titles had been established by the Court of Claims.

From the whole treatment of the subject, it is clear that Congress never would have passed the act as a gratuity. No one would have ventured to try the temper of Congress with such a proposition. Had there been any escape from the full obligation which the reports of the Court of Claims imposed, Congress would have taken advantage of it only too readily, and it was reluctantly forced into payment by the situation which is unanswerably set forth in the report quoted above.

## V.

Coming now to consider the language of the act of 1891, we wish, before discussing the proviso, to call attention to the general provisions of the act.

In the first place, the act is not framed as one making gifts, or even as meeting claims the exact nature of which was still undetermined. It is "to pay the findings of the Court of Claims on the following claims," etc. (26 Stat. at L. 897). It is thus the actual awards of the court which are to be paid

as such, and by this the judicial findings are expressly adopted and satisfied. In the face of this provision, we submit that it is not now admissible to contend that Congress did not adopt the conclusions of the court, or did not intend to recognize its express findings of fact and law, but meant to reject them, and, going behind them to the original claims, meant to treat these as having a wholly different character from that which the court had found.

In view, too, of the declared purpose to pay the findings, there is a probability from the outset that all findings are equally accepted unless expressly excluded, since it cannot be supposed, without clear expression, that of the same class some are arbitrarily excluded, though specifically named as within the scope of the act.

In the next place, the specific appropriations are made by name in each case, and, when examined, the list shows plainly that the strict rules of property have been observed in every case but the express case of bankruptcy.

The persons whom Congress meant to recognize were indicated as far back as the act of 1885, which provided that —

> "Such citizens of the United States, or their legal representatives, as had valid claims . . . may apply by petition to the Court of Claims," etc.

Thus it was the legal representatives, and they alone, who were encouraged to enter upon the long and expensive litigation necessary to establish their rights. Relying upon this, William Gray, Jr., — to illustrate many cases by this actual one, — procured letters of administration with the will annexed upon the estate of William Gray, the original sufferer. By this appointment he became bound to administer the estate for the benefit of those claiming under the will, as in the case of every executor. He proceeded to col-

lect his evidence and try his case. What this meant in outlay of money and time may be conjectured from the situation, the events being nearly a hundred years old, every participant in them dead, the papers which showed ownership and loss scattered and lying hidden in numberless places, and the disputed questions both of fact and law being numerous and intricate.

All this was done at the expense of the legatees, for certainly no next of kin not a legatee had any intimation that it was being done for his benefit, nor any expectation that Congress might, without request from any one, capriciously pass over the real owners and give the results to others. At last a decision was rendered in favor of the petitioner, and the Court of Claims reported to Congress the facts of the case, including a finding that the claimant, in his representative capacity as administrator with the will annexed, was the owner of the claim, that it had never been assigned, and that the claimant was "entitled to the following sums from the United States." (See Report, p. 27.)

The situation was thus summed up in the committee's report which accompanied the act of 1891, and from which we have already quoted above (Sen. Rep. No. 2320, 51st Cong. 2d Sess.):

> "Congress, by an overwhelming majority, passed the act of January 20, 1885, referring the parties to the Court of Claims, and inviting them to establish their rights before that tribunal. They accepted that invitation, and have pursued the remedy prescribed by Congress, for four years, at great expense to themselves. It has involved suing out letters of administration *de bonis non* on the estates of the original sufferers; the identification by deposition of the estates administered

with the persons who suffered the loss; the preparation and printing of petitions, prayers for findings of fact, briefs, and summary statements; the expense of obtaining (in many instances from abroad) and copying evidence of the losses and condemnations.

"When Congress opened its court to the claimants, and thus invited them to avail themselves of the opportunity of establishing their claims in pursuance of the mode provided by the statute, it was a moral assurance that Congress would pay those established before the court, unless something in that decision showed that they should not be paid."

(See also extracts cited above.)

The act of 1891 was accordingly passed, to pay the findings made, and money was appropriated to William Gray, administrator, etc. We submit that, to take the money away from him as administrator in the capacity reported by the court, and to give it to him in trust for other persons by a subsequent proviso of the act, must require very explicit language.

In every case in the appropriation act, Congress has carefully followed the decisions of the Court of Claims, and everywhere (except in cases of bankruptcy) has recognized the claims as having passed in ownership wherever other property would pass.

In several of the cases the persons expressly appear in the act as executors, in many cases as administrators with the will annexed, and in many others the general designation administrators, or administrators *de bonis non*, must cover administration with the will annexed, as happens in several of the William Gray items.

When the original claim belonged to partners, the appropriation is to the estate of the surviving partner. When the original claim had been assigned otherwise than by an assignment in bankruptcy, the appropriation is to the assignee, as in the case of the ship "Rosanna," where $66,560 is appropriated to James S. Humbird, trustee; and from the report of the court in that case (Sen. Doc. No. 51, 50th Cong. 2d Sess.) it appears that Humbird held under a deed of trust made by the original claimant in 1827 for the benefit of certain women, not next of kin nor in any way connected with the claim. So, too, in the case of the "Virginia," where the appropriation is in favor of the estates of Corcoran, Riggs, and Smith, it appears by the report (Sen. Doc. No. 6, 50th Cong. 2d Sess.) that the original claimant assigned his claim in 1831 to the Bank of the United States in satisfaction of a debt; that the bank subsequently sold it to other persons, who in turn sold it to Corcoran, who, by a collateral agreement, was to divide it with Riggs and Smith.

In every case (except bankruptcy) the title is recognized as it stands, with strict regard to property rights. Certainly to override such specific payments, and to abolish the declared trusts and create new ones, a very clear direction must be found somewhere in the act.

Before considering the language of the proviso, it is to be observed that the fact that its provisions, whatever they may be, respecting ownership, are put in this subordinate place in the act, is significant of a purpose not to change the general features or plan of the statute. A proviso is not to be treated as changing the act beyond what is expressly required. To quote the language of STORY, J., in *United States* v. *Dickson*, 15 Pet. 141, 165, —

"We are led to the general rule of law which has

always prevailed, and become consecrated almost to a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as the reason thereof."

So, too, *Ryan* v. *Carter*, 93 U.S. 78, 83.

The provision about bankruptcy we understand to have been put into the proviso as a precaution or correction of possible errors in the body of the act, as we shall presently explain, and it was not intended to alter, but rather to confirm, the main part of the act. On what theory was it left for the proviso to express a totally different method of payment from that explicitly directed by the main act? The several items had been repeatedly and carefully examined by committees of successive Congresses, and certain ones eliminated. It would have been easy to select those where the claims were owned under will, and to make the appropriate change in the item, and if anything further had been needed to prevent mistakes, a general statement in the proviso might have been added. To give the money to one set of persons in the main act, and take it wholly back by a casual provision in a proviso, is at least unusual.

## VI.

We now come to the language of the proviso, which is as follows: —

> "*Provided*, that in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the case of the individual claimants shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represents [*sic*] the next of kin, and the courts which granted the administrations, respectively, have certified that the legal representatives have given adequate security for the legal distribution of the awards."

We venture to say that few persons read this paragraph for the first time without getting for their first and natural impression the understanding that it is intended only to make an effectual exclusion of assignees in bankruptcy. The questions which have sprung up are possible only on account of the awkward form of expression, which is ambiguous enough to make a perfectly sensible rendering of every word difficult, but which ought not to leave any reasonable doubt of the intent of the paragraph as a whole. Seizing on an unexpected allusion to next of kin, interested persons have been able to contend for a construction which has nothing whatever in the nature of the subject, or the proceedings in Congress, or the reason of the case, to warrant it. If the next of kin get the money to the exclusion of the rightful owners, they get it by an arbitrary provision which must be the result of careless expression, so foreign is it to everything which could have been expected after nearly a century of agitation on the part of legatees, during which there has never been, so far as we can learn, a single suggestion made by any one anywhere that they should be passed over in favor of next of kin.

Against any construction which excludes owners by will, if such a construction can be tortured out of the proviso, we put the plain intent of Congress to pay claims admitted to be valid obligations, and to pay them to the owners as designated in the body of the act.

The first consideration regarding the construction contended for by the next of kin is that, if they are to take the money in cases where there was a will, and, of course, take it necessarily wherever there was no will, then they are to have it in all cases. Why, then, is there any allusion to bankruptcy cases? Why does the act start off with a particular provision that they shall have it in cases where the original sufferers were bankrupt, if they are to have it in every possible case?

On this theory, the first clause is wholly superfluous; and yet that clause is the leading one in the paragraph, is the most exact and emphatic, and, indeed, is the only one free from ambiguity. It is obviously intended to express the main purpose of the proviso, and is the one substantive proposition upon which the others seem to depend. Any construction which would make that clause redundant is certainly objectionable.

*Platt* v. *U. P. R.R.*, 99 U.S. 48, 59.

Furthermore, if the next of kin of the original sufferers are to take in all cases, how is that consistent with the appropriations which are expressly made to other owners who stand in no relation whatever to the original sufferer's next of kin? Not to mention executors, and administrators with the will annexed, who represent legatees, who is to have the money which is awarded to the estate of a surviving partner? All the partners were equally original sufferers, and all may have

left next of kin, yet the appropriation is only to the present owner. So of the cases of voluntary assignment, of which there are at least two, as pointed out above: the money is appropriated to the representative of the assignee, and he cannot on any theory represent the next of kin of the original assignor. What becomes of these items? Are they not conclusive of an intent to pay to the owners as specified, regardless of next of kin?

## VII.

The first clause of the proviso, excluding assignees in bankruptcy, and expressly giving their awards to the next of kin, is free from ambiguity, and shows how unmistakably such a substitution is expressed when desired.

Assignees in bankruptcy were undoubtedly the owners of the claims whenever the original sufferer became bankrupt, and they were so recognized by the Court of Claims, which reported them as owners. *Buchanan's Case*, 24 Ct. Cl. 74. The next of kin argue, from this exclusion, that, as Congress has in this instance taken the money away from the owner, it shows an intention to treat the whole matter as a gratuity and give the money arbitrarily. The inference appears to us to lead the other way, for this exclusion of certain owners, being the only express provision of the kind, recognizes ownership as the ground of claim, and implies that, but for this, those owners would have taken. The general rule is thus left to operate in all cases not named. If it was intended to exclude also owners by will, why are they not coupled with the assignees in bankruptcy; or, still simpler, why was there not a general statement that next of kin should take in all cases, since, as pointed out above, the law would come to that on the theory contended for by the next of kin?

But the exclusion of assignees has a special and sufficient explanation, and was a provision foreshadowed from the begining. It had been for many years perhaps the chief objection urged against the payment of these claims, that they had been assigned to such an extent, in closing out bankrupt estates and otherwise, and for such nominal considerations, that they were largely in the hands of persons who would make inordinate profit from the payment of them. To pay them in such cases would not benefit the sufferers or their families or legatees, but would only enrich persons who had taken advantage of the misfortunes or discouragement of the sufferers to buy the claims at low prices. This objection is repeatedly referred to in the reports made to Congress. It was, perhaps, but an instance of the general objection which Congress has shown to permitting the assignment of any claims against the government, as appears by the statute prohibiting it. (U.S. Rev. St., secs. 3477, 3737). See *Goodman* v. *Niblack*, 102 U.S. 556. Accordingly one of the matters referred to the Court of Claims by the act of 1885 was the question of assignment, and the court was directed to report in each case the present ownership of the claim, whether any assignment had been made, and, if made, for what consideration.

As stated in *Adams' Case*, 26 Ct. Cl. 249, the solicitude of Congress proved to have been in great measure unfounded, for very few of the claims had been transferred by private assignment, and in cases where this has happened, Congress seems, in at least the two cases referred to above, to have been satisfied that the claims had not thereby lost their merits. Whether there were any cases of private assignments where payment was refused does not appear.

There were, however, several cases of assignment in bank-

ruptcy, in each of which the assignee, or rather his representative, was reported as owner.

These cases Congress and its committees seem to have determined at once to eliminate. The reason of this is not far to seek when the age of any possible bankruptcy proceedings is considered. There have never been but three bankruptcy acts, — one in force from April, 1800, to December, 1803, one from August, 1841, to March, 1843, and the last from 1867 to 1878.

The only one of these which would have affected the original sufferers was the earliest, unless in a few possible cases where the second might have had operation, though the lapse of time would make that improbable, and would make the third entirely out of the question.

The act of 1800 (2 U.S. Stat. 19) was restricted in the description of persons to whom it applied, provided only for involuntary proceedings, was by its terms limited to about five years, and was in fact repealed in less than four.

Considering now that this act was passed before the treaty with France in which our government appropriated the demands against France, that it was of very brief duration, that it operated only in a compulsory way and included no voluntary conveyances, that it was purely a statutory privilege allowed to creditors, expressly temporary in its character, and soon wholly withdrawn as unsatisfactory, it was not strange that Congress should deem it desirable to prevent any such inequality among the claimants as would arise in consequence of bankruptcy having happened in certain cases during those four years while the act was in force.

Moreover, any bankruptcy proceedings under that act must long ago have been wound up, and probably the remnant of assets sold, as uncollectible, for a nominal price, under the provision of the act (sec. 44) which authorized the

assignees to sell all the property in their hands at public auction, and Congress was determined not to benefit such a purchaser. Add to this the facts that the original assignees and creditors were probably nearly all dead, that the machinery of the law was out of use, that there had been sub-bankruptcies, sub-assignments, insolvencies, wills, intestacies, dissolutions of copartnerships, — is it not plain that to leave the money to take its course under that act would have been merely to waste it in fruitless and interminable litigation? It is not too much to say that in almost any such case an award in favor of an assignee would probably have been no award at all, unless the claims had been bought up with other assets by some known person, and such a person Congress did not consider a meritorious claimant, and it was quite willing to pass over such owners and leave them to apply again if they thought they were aggrieved.

That Congress did, for whatever reason, deliberately set about eliminating the bankruptcy cases from the list of awards appears from the successive appropriation bills, as stated in *Henry's Case*, 27 Ct. Cl. 142.

The first bill was reported in 1889 (H. R. Bill No. 12,571, 50th Cong. 2d Sess.), and in this bill all awards to bankruptcy assignees had been cut out of the list, except three, which showed on their face that they were of that character, viz., one to Ebenezer Gay, administrator of executor of assignee in bankruptcy of Thomas English; one to R. C. McMurtrie, administrator of J. Bohlen, surviving assignee in bankruptcy of Ross & Simpson, and one to H. L. Waln, surviving executor of J. S. Waln, surviving assignee in bankruptcy of T. Murgatroyd. This bill contained no proviso.

In August, 1890, a second bill was reported (Sec. Doc. No. 1589, 51st Cong. 1st Sess.; H. R. Bill No. 11,459), in which two of the above items had been stricken out, but that

in favor of Ebenezer Gay remained. In that bill also there was no proviso. It seems plain that the Gay item was left in by inadvertence. The committee on appropriations which reported on that bill (H. R. Doc. No. 3121, 51st. Cong. 1st Sess.) remark that "your committee are informed that the Senate did not intend to pay any of the bankruptcy cases, yet, as a matter of fact, the amendment [to the appropriation bill] provides for the payment of at least one of such claims." The committee append to their report a statement of Mr. Russell of the Department of Justice, in which Mr. Russell says that he thinks that most of the awards in favor of assignees in bankruptcy are eliminated, and the committee asks him to indicate on the margin of the bill how many remain. A schedule is annexed, with a note calling attention to this one bankruptcy claim indicated by Mr. Russell.

In 1891 the bill as it finally passed was reported, that single bankruptcy case being now stricken out and the proviso added at the end. The committee in their report (Sen. No. 2320, 51st Cong. 2d Sess.) accompanying the bill providing for payment, insist that insurance claims ought to be paid, referring to the decision of the Court of Claims (*Adams' Case*, 26 Ct. Cl. 250), and then recommend the insertion of the proviso, without explanation or comment.

It appears, then, from the history of the agitation for many years, and from the declared attitude of Congress in its legislation in 1885, and ever since, that Congress had its attention especially fastened on the subject of the assigned claims, and as soon as the reports of the Court of Claims were received there was a definite purpose to exclude assignees in bankruptcy. No argument can be made successfully from this exclusion that ownership generally was to be disregarded. So far from that, it is to be inferred that this discussion and careful revision of the list of awards, for the

purpose of striking out one class of owners, would never have gone on if there had been any intention to adopt a plan which would make such consideration unnecessary by paying every award, without discrimination, to next of kin. Not a word is anywhere said, in any bill, report of the court, report of a committee, or debate in Congress, which suggests that any one ever had in mind a discrimination between owners by will and next of kin.

The successive modifications of the appropriation bills as described above furnish, we submit, a complete explanation of the way in which the proviso came to be attached to the bill, and of its meaning and purpose.

The committee, revising the list of awards to eliminate assignees in bankruptcy, found that three cases had escaped them in the first bill, and that in a second revision one was still inadvertently left in. To guard against any other case of oversight, and perhaps also to meet cases where the ownership by an assignee might not be quite apparent, the committee finally tacked on a proviso at the end:

> "*Provided*, that in all cases where the original sufferers were adjudicated bankrupts, the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy," etc.

This was, in our opinion, the single purpose of the proviso, and its subordinate provisions, expressed with some confusion, and probably in haste, are meant only to carry out that intention.

While speaking of the exclusion of assignees in bankruptcy it may be well to refer to the suggestion which has been made, that this provision indicates an intention on the part

of Congress not to let creditors have the money in any case, whether there had or had not been bankruptcy, and it is argued that creditors might get it in a case where the original sufferer died insolvent, though never actually in bankruptcy, if the money was treated as a part of his estate. It is urged that, to avoid this, Congress meant to give it in every case to next of kin. This suggestion has no application in this case, for William Gray's creditors, if there were any, are long since paid, nor does it appear whether there is any case in the list to which it would apply; but the objection is urged as a theoretical difficulty.

Whether it is possible that money now received by an administrator with the will annexed as assets of his estate should go to satisfy creditors of an original sufferer, can only be determined by an examination of the statutes of each state in which such an estate is to be administered. It seems probable that claims of creditors must be long since barred under the usual statutes of limitations. If in any state there are provisions which would permit claims to be revived against after-acquired assets, as happens in Massachusetts, apparently no advantage could accrue to a creditor from that, since the French claims are not new assets. They were a part of the estate of the original owner at his death, well known, and, no doubt, reckoned among his property, and were strictly a part of his assets though not enforceable until our government afterwards made them so.

*Foster* v. *Fifield*, 20 Pick. 67.

But whatever may be the particular provisions of state statutes, and whatever the theoretical possibility that creditors of half a century ago might now reach the money under local laws, that inquiry throws no light on the meaning of the act of 1891. Congress cannot be presumed to have had such special and remote consequences in mind, nor to have paid

any attention to such details. As stated by the court in *Balch* v. *Blagge*, *supra*, —

> "Congress, so far as it made appropriations for the payment of the claims, appears to have so dealt with them (*i.e*, as property), except in the case of the bankruptcy of the original sufferers. . . . It is probable that it never occurred to Congress that, except in the case of bankruptcy, there could be existing creditors who, under the laws of the domicile of the original sufferers, would now have valid claims against their estates."

But whatever Congress may have thought of, respecting creditors, it is certainly going altogether too far to assume that Congress meant to deprive legatees of their property and give it to next of kin, merely in order to adopt a clumsy plan to circumvent creditors. If that had been the great object it would have been easy enough to say so, and to declare that the money should not be assets for creditors either in bankruptcy or under state laws governing insolvent estates. But why sacrifice legatees? There is no such connection between creditors and legatees as would move Congress to couple them together when its main purpose was only to exclude the former.

We submit that Congress had only one purpose in mind, and that is the one of which we know the reason, and which is plainly expressed, namely, the purpose to exclude assignees in bankruptcy, and everything else is only ancillary to that.

It may be asked here, Why did Congress, after it had cut off assignees in bankruptcy, substitute next of kin for them, instead of giving legatees also their proper interest in the money so set free, in any case where there might be a will?

Our answer is that Congress has not done this, for, as we interpret the proviso, next of kin probably includes legatees in this clause, as it does, in our view, necessarily include them in the next clause. But even if the words "next of kin" should be taken literally in this clause, so that the assignee's money would go wholly to those who are literally covered by the words, this would not deprive legatees of any rights. The claims in these cases are no part of the estates of the original sufferers, having passed to assignees in bankruptcy, and no testator could have supposed that he was leaving them to his legatees. If, therefore, Congress decided, for reasons which seemed satisfactory, to take the proceeds of the claims away from the assignees who owned them, it might have seemed better to give them to the next of kin rather than to follow the terms of a will which did not include them, on a conjecture that the testator would have done this had he had opportunity. At all events, there would be no injustice in refusing to give the money to legatees who had no claim on it: there would be distinct injustice in doing so with money which belonged to them.

## VIII.

So much for the first clause, and the exclusion of assignees in bankruptcy. If legatees are also to be cut off, it cannot be under that clause, but under the next, which is as follows: —

> "and the awards in the case of the individual claimants shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represents the next of kin."

If this declares an intention that every award, to whom-

ever made, shall be for the sole benefit of the next of kin, it is the first and only suggestion of such a purpose in the whole history, discussion, or legislation concerning the claims. The next of kin maintain that the clause does so declare, interpreting it as a sweeping provision that every representative who receives money takes it on a trust to pay it over exclusively to them.

They argue that, since no money can be collected except on a certificate that the recipient represents the next of kin, therefore the money when collected must be paid over to the persons represented, this being a method of establishing a special trust for their exclusive benefit. As illustrations of trusts imposed upon executors or administrators, but outside the trusts inhering in their office, the next of kin refer to statutes making representatives accountable to heirs for rent collected upon real estate belonging to them, and to money received for special uses, as in the case of insurance policies payable to representatives for the use of persons designated in the policies, or damages for injuries causing death and paid to representatives under statutory proceedings for the benefit of wife or children.

It is, of course, unquestionable that a representative may have possession of money incidentally in many ways, upon a special trust outside his proper trust as representative, and in such a case the money would form no part of the estate which he is administering. The question is not whether such an arrangement is possible, but whether Congress has made it here: and upon this question the burden is upon the next of kin to establish such fact. It certainly will not be disputed that money paid to an executor as such, in satisfaction of a debt owed to his testator, is to be accounted for as a part of the testator's estate. This we understand to be the case here. If, however, the debtor, being by chance in a

position to dictate, as the government is in this case, refuses to pay the debt, but pays an equal amount to the executor upon a special trust to turn it over to strangers, then, of course, it is no part of the estate. Such a contention, however, must involve the position that the money was not paid to satisfy an obligation, but was an independent payment. We insist again, therefore, that the next of kin must stand squarely upon the gratuity theory. Nothing short of that will serve their case, and there is no half way.

By the appropriations in the body of the act, not only executors and administrators of the estates of the original sufferers are designated, but, as pointed out above, representatives of the estates of surviving partners, and of assignees under special assignments. Did Congress intend, by the clause which we are considering, to cut off the proper beneficiaries in all of those cases, and impose upon the designated representatives a new trust wholly foreign to their office? It can hardly be that such a distinct enactment is to be found in such a subsidiary clause. The sentence is plainly incidental to the previous sentence, from which it is separated only by a comma. It does not allude to legatees, nor to any beneficiaries who are finally to receive the money, nor expressly to any trust to be imposed upon the representatives. It does not purport to change the purpose or manner of the appropriations already made in the act, but, on the contrary, recognizes them, and assumes that they are to continue as made. It is a mere direction as to the certificate which the treasury is to have before payment, and appears designed rather to protect the treasury against any infringement of the requirements of the previous clause, than a new enactment radically inconsistent with the general scheme, as well as with many of the actual provisions of the main portion of the act.

It is very improbable that a new provision, so fundamental, so subversive of many of the appropriations made in the act, and involving such a complete and unexplained departure from the accepted view of the obligation of our government, should be conveyed in such an incidental and subordinate sentence of a proviso. Nothing would have been easier, as pointed out above, than to say that next of kin should have the money in every case, as was so plainly said about assignees in the first clause. This once said, everything, including the bankruptcy clause itself, would have been accomplished.

But as we read this clause of the proviso, the requirement of a certificate from the Court of Claims, instead of imposing a new trust, expressly recognizes the old trust.

The persons who are first to receive the money are fixed by the act, and are not changed by the proviso. They are trustees appointed by probate courts; they have trusts and represent beneficiaries exactly determined by law. When, therefore, the Court of Claims certifies to the Secretary of the Treasury the character of those trusts, it must certify them as they are, and not otherwise, and the act must require such a certificate, and not a different one. The act does not contemplate a new appointment upon a new trust, and require a certificate of this new office. It deals only with the trustees as they actually stand, and as they are decribed in the appropriating items. The trusts to be certified are those which have been already established in the Court of Claims and reported to Congress, and the evidence of which is largely in the possession of that court. The only reason for requiring another production of that evidence is to have in convenient form a certificate which will exclude one class which the court reported, namely, assignees in bankruptcy, and possibly also

one which will make sure that every one who has any connection with the estate is notified, and thus finally disposed of by the payment.

Accordingly, the Court of Claims has granted its certificates to all entitled to payment, certifying on the strength of the trusts already established. In an effort to give some further meaning to the act of Congress, the court has required one further thing, which may be unnecessary, namely, evidence that the next of kin had notice of the proceedings in the probate court appointing an administrator with the will annexed. *Hooper's Case*, 28 Ct. Cl. 480. But this is stated to be done on a theory that Congress wished to be sure that next of kin were made aware that a part of their ancestor's estate was being collected, and the case gives no countenance to the theory of a new trust. In our opinion, the act does not require even that evidence of notice to the next of kin, but the main view of the Court of Claims is wholly in accord with that which we urge, and some uncertainty about such a detail may well be expected in so badly drawn an act.

On such a certificate from the court, given by virtue only of his appointment from the probate court to a trust to administer the will of William Gray, Sen., and countenancing no other trust, the administrator in this case has received from the treasury the fund in question. Can there be any question on what terms he holds it?

No certificate certifying to the original appointment, can disturb the terms of that appointment. Every certificate which the court has granted to executors and administrators with the will annexed is contrary to fact unless in accord with the existing trust. The Court of Claims has no authority to make a new appointment, and has never pretended to do so.

It will be urged that the act itself imposes a new and special trust. This, of course, might be done, but it will need very plain language to do it. But if that was the intention, why require a certificate of any kind? A certificate of the old trust would be quite inappropriate: the new trust would require no certificate at all. The new trust, on that theory, would be expressly imposed, by the act itself, on every recipient of money, and any person entitled under that trust need only appeal to the act which established it. There could be no doubt, on that theory, whom the recipient now represents, and it is of no consequence whom he had previously represented.

The requirement of a certificate seems to assume that there might be representatives named in the act whom Congress did not intend to approve, and such would be representatives of assignees in bankruptcy, if any still remained. It was, in our view, solely to satisfy the Secretary of the Treasury that none of this excluded class had been inadvertently admitted that a certificate was required. If such was the object, or if the general purpose was to protect the treasury in any respect, as the form of the act strongly intimates, then the language ought not to be carried farther than is necessary to that end. In that view, the act is closely analogous to the statute declaring all assignments of claims against the government "absolutely null and void," unless executed with certain formalities. (U.S. Rev. Sts. sec. 3477.) Yet it is held that this statute, being designed only to protect the government, does not affect the rights of parties *inter se*.

*Goodman* v. *Niblack*, 102 U.S. 556.

## IX.

The final clause of the proviso is this:

> "The awards . . . shall not be paid until . . . the courts which granted the administrations, respectively, have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

This, we submit, is wholly inconsistent with any interpretation which excludes legatees, and ought to put the question at rest.

The requirement that the several probate courts shall certify concerning the security which executors "have given" can point out to only one thing, — the bond previously given in the probate court to discharge their trust as executors, — and this alone can determine the "legal disbursement of the awards."

The probate courts not only have not required security for any other disbursement, but they have no power or jurisdiction to do so; and the suggestion that a federal statute is seeking to impose a new jurisdiction and a new duty upon our local probate courts cannot be seriously entertained.

*Clement's Case*, 150 Penn. 85.
*In re Leffingwell's Estate*, 62 Conn. 347.

The plaintiff in this case has obtained his money on a certificate from our probate court that his bond as administrator with the will annexed is adequate security for the legal disbursement of the awards. By necessary implication, he must pay over the money as required by that bond. That bond is conditioned to administer the estate according to the will of William Gray. What more need be said? In what pos-

sible way can one of the next of kin of William Gray, who is not a legatee, find any security in this bond if he is refused a share of the money?

If the plaintiff should pay the money over to the next of kin, why would he not make himself liable to the legatees by the terms of the very bond which Congress has adopted as the security for carrying out its will? What can there be of "legal" character in a disbursement of the awards made on a new plan arbitrarily imposed by the act, and radically inconsistent with that required by the terms of the security? What, finally, have "the courts which granted the administrations" to do with the matter if their appointments are inoperative, and a new appointment to a new trust is made by virtue of the act?

It has been suggested that an executor's bond sometimes, under the statutes of Massachusetts, covers property in his hands which does not belong to legatees, as if he collects rents of real estate, which must belong not to him as executor but to the heir or devisee. *Brooks* v. *Jackson*, 125 Mass. 307. But this is wholly statutory, and is designed not to contravene the will, or to take property out of it, but to give some remedy to an heir or devisee who sees his property finding its way into hands where it does not belong. (See *Almy* v. *Crapo*, 100 Mass. 218.)

That Congress might arbitrarily make a similar provision regarding the French claims money we do not dispute, for Congress might pay it as a gratuity to whomsoever it chose. We do insist, however, that Congress cannot do this and at the same time recognize and adopt the trust imposed by the original probate proceedings, and require the money to be disbursed according to the probate bond. Not even Congress can put the fund both in and out of the estate at

one and the same time. As remarked in *Clement's Case, ubi supra*, —

> "It is contended that the proviso is evincive of an intent to make a direct gift to the next of kin of Jacob Clement, the original claimant. If this be so, either the intent was futile for want of power in Congress to divert the estate of a decedent from the statutory course of administration, or the money paid was no part of the estate of Jacob Clement, deceased."

X.

What the true construction of the proviso may be is not, in our view, a question chiefly incumbent upon us to solve. If we are right in the position taken above it is for our opponents to establish an interpretation which will divert the money from the owners of the claims which are to be paid, and if the ambiguity of expression makes a satisfactory rendering impossible, it is not the owners of the claims who should suffer. There is, however, a construction which seems to us obvious, and that is, as intimated above, that the proviso aims only to exclude assignees in bankruptcy, certificates being required in all cases only to accomplish this exclusion; and when Congress refers to next of kin as the beneficiaries, it does not mean to disturb the course of the law in any other respect than that, but uses these words to indicate all who would take the estate of the original sufferer, whether by will or in intestacy, excepting only such assignees. That is, the words "next of kin" mean legatees or distributees under the statute, as the case requires.

The Court of Claims has decided in *Henry's Case*, 37 Ct. Cl. 142, that the proviso does not refer to the appropriations

made in the act itself, but was intended to govern cases which should subsequently arise in the court. If this is correct, we are spared the necessity of discussing the proviso at all in connection with money already paid. It appears to us, however, that, while the suggestion of the court very probably does explain one chief purpose of the proviso, it may go too far in allowing it no application to the items in the act of 1891. While it is true, as the court points out, that the act appears to contain no items in favor of assignees in bankruptcy to which the proviso can refer, still Congress had already twice allowed items of that kind to slip in by inadvertence, as stated above in this brief, and probably Congress now meant not only to lay down a rule for the future, but to provide another opportunity for scrutinizing the claims, in order that mistakes might not again occur, nor any assignee get in by reason of not being plainly disclosed in the reports made by the Court of Claims.

It is a curious circumstance that it was apparently the Court of Claims itself which led Congress into the use of the words "next of kin" to describe the class opposed to assignees in bankruptcy and to include all other owners.

In the case of the ship "Jane," 24 Ct. Cl. 70, the question was whether, after an assignment of the claim for the benefit of creditors, the original owners should be reported as owners, the assignees not appearing as claimants.

In the opinion the court comments on the general difficulty of ascertaining the persons who would be now entitled to the money resulting from the French spoliation claims; and after remarking that "some [of the original owners] transferred their claims, some bequeathed their claims by will and some died intestate of them," the court goes on to say, —

"In none of these cases has the court assumed to de-

termine who were the next of kin of a deceased claimant, nor in what proportion were the several interests of partnership owners, nor whether creditors or descendants have the superior equity. . . .

"When the validity of a claim . . . and the amount in which the original claimant suffered loss, have been determined and reported, Congress will be in possession of all the facts which this court, under its present restricted jurisdiction, can possibly furnish.

"It will then be within the legislative jurisdiction (1) to ascertain through the proper committee who are the persons who should receive the money, or (2) to provide for the ascertainment of the fact by additional legislation, or (3) to confide the money to the administrators and receivers who, with the exception of a few still existing corporations, constitute the present claimants, trusting that they, and the courts of which they are the officers and agents, *will distribute the funds among the creditors or next of kin of the original claimants.*"

It is plain that, in the latter part of this extract, and especially in describing the third of the three courses open to Congress (that course which Congress actually adopted), the court uses the words "next of kin" in contrast to "creditors," and uses it to include legatees, since it had expressly recognized them earlier in the opinion as entitled in the case of wills, and as a class represented by the representatives whenever entitled.

Is it not clear that Congress, in following the suggestion of the court, has adopted its language and in the same sense? If a court of law can use the words with this extended significance in this very matter, should there be any hesitation in attributing to Congress the same meaning, especially where

the sense almost imperatively requires it? The proviso is wholly without ambiguity if those words are so understood. The certificate that the representatives represent next of kin (including legatees) operates, as it should, only to exclude representatives of assignees in bankruptcy.

This interpretation has also this advantage, that, being applicable all through the proviso, even in cases of bankruptcy, it saves us from the necessity of taking the property in the bankruptcy cases away from legatees, where there are such, and giving it as if the original sufferer had died intestate.

On this interpretation, certificates are required in every case only as evidence that the representatives who are to take are not representatives of assignees in bankruptcy, which was a natural precaution. The certificates are only such as the court can properly make in every case, since they are in conformity with the facts and the law, and they effectually accomplish the one purpose of the proviso, namely, the exclusion of assignees.

The words "next of kin" are by no means so exact that it requires any violence to interpret them so as to include legatees. They are often popularly used, as they were used by the Court of Claims in the extract quoted above, to signify those who take the property of a dead man, without reference to the distinction between testacy and intestacy.

In 2 Story's Equity, sec. 1065*a*, it is stated that —

> "next of kin is sometimes construed to mean next of blood or nearest of blood, and sometimes only those who are entitled to take under the statute of distributions, and sometimes to include other persons."

The words are variously interpreted, both in wills and statutes, sometimes to include and sometimes to exclude husband or wife, and are so used in different places in our Massachusetts statutes as to require now one and now the other meaning.

*Swasey* v. *Jaques*, 144 Mass. 135.
*Bailey* v. *Wright*, 18 Ves. 49.
*Cholmondely* v. *Ashburton*, 6 Beav. 86.
*Betsinger* v. *Chapman*, 88 N.Y. 487.
*Murdock* v. *Ward*, 67 N.Y. 387.
*Seabright* v. *Seabright*, 28 W. Va. 412.

An illustration in point is furnished by Stat. 21 Hen. VIII., c. 5, which provides that, —

> "in case any person dies intestate, or that the executors named in any such testament refuse to prove the said testament, then the said ordinary or other person having authority to take probate of testaments, as is above said, shall grant the administration of the goods of the testator, or person deceased, to the widow of the same person deceased or to the next of kin, or to both."

Under this act it became the practice, when the next of kin had no interest in the property, not to grant him administration, but to grant it to one interested; as in the case of an executor dying, it was given to the residuary legatee, etc.

> "Where the next of kin has no interest in the property he is by the spirit, though contrary to the letter, of the act, excluded; where there is a residuary legatee he excludes the next of kin."

*West* v. *Wilby*, 3 Phillim. 374, 381.
*Young* v. *Peirce*, 1 Freeman, K.B. 496.
*Thomas* v. *Butler*, 1 Ventr. 217, 219.

But even if Congress did not use the words "next of kin" in a popular sense to include legatees, it is enough if they are accepted as used in contradistinction to assignees in bankruptcy, with the main purpose of excluding the latter. If this be done, they should be carried no farther than to accomplish that purpose; and it should be held, we submit, that, the statute being ambiguously drawn, the court will seek to give effect to the main purposes of the whole act, even if a few words are taken in a more general sense than they usually bear. Taken in such a spirit, the act would be interpreted so as to pay the claims, as admitted obligations, to the designated persons, excluding only such as are expressly excepted.

To give a literal meaning to the three words "next of kin," and thereby subvert the main purpose of the act, would be to sacrifice the greater to the less.

The word "individual" is not quite a natural word in the connection in which it stands, and it is hard to discover an exact meaning for it. It is not important and, so far as we see, has no significance which would throw light upon the main question now under discussion, or favor one interpretation more than another. It is probably used to indicate the claims taken one by one, in the sense of "several," or "each of," as one speaks of the individual members of any company or aggregate, and in this sense it supplements the first clause referring to bankrupts.

It might be supposed to be used in an implied opposition to corporations, of which there are but six named in the act, three of these being described as administrators; viz., on the schooner "Mary," The Rhode Island Hospital Trust Company; on the brig "Mary," John Stewart, receiver of the Baltimore Insurance Company; on the schooner "Emily,"

John Stewart, receiver of the Baltimore Insurance Company; on the ship "Triumph," Safe Deposit & Trust Company of Baltimore, administrator of Alexander Mactier; on the ship "Raven," the Pennsylvania Company for Insurance, etc., administrators of Thomas Willing, surviving partner of Willing & Francis; on the schooner "Frederick," the Union Trust Company of New York, administrator of Jacob Doty. It is hard, however, to conjecture any reason why these companies should be exempted from the operation of the proviso. If they are, the three companies which take as administrators would unquestionably have to distribute the money which they receive, as a part of the estate of the original claimant. If by "administrator" in any of these cases is meant administrator with the will annexed (as may well be, for the single word is repeatedly used in the act to stand for the longer title), the money would go to legatees, and this would furnish an argument for recognizing legatees throughout the act; for it is not probable that Congress meant the estates in these three cases to take a different course from all others. If the three companies are simply administrators of intestate estates, the money would go as a part of the estates to next of kin, determined as of the death of the intestate.

## XI.

If the act is to be construed so as to give the awards in every case to the next of kin, some probable reason for the discrimination should be suggested. A purely arbitrary exclusion of some owners is most unlikely.

Congress began with an apprehension that some of the claims had been assigned in a way to deprive them of merit. It ended by excluding, in one sweep, all assignments in bankruptcy, though allowing the cases of involuntary assignments

for value. It has given no other intimation anywhere of a purpose to discriminate between owners.

Why should it be thought desirable to declare every estate intestate as to these claims?

The presumption surely should be that Congress meant to let the original owners do what they chose with a piece of property which must be considered as strictly their own. Letting it pass by will may, in some instances, put it out of the family of the first owner, but what objection is there to that? A legacy is made upon some consideration of justice, affection, or necessity, and why is that to be interfered with? Very often next of kin are not descendants of the owner, but of his brothers or sisters, or perhaps of wives, if wives be admitted in any state within the description of "next of kin." Certainly no strong claim for recognition can come from the family of a collateral relative. It cannot be that Congress supposed that they could now do more substantial justice by re-making wills in order to establish equality among descendants. It is to be assumed that testators, who knew their own circumstances and the situation of their children and relatives, made a more equal and just division than can now be made by a rule of mechanical equality. If one child had received his portion during the testator's lifetime (as may be assumed to have been the case with Mrs. Swett, the daughter of William Gray), and if for that reason the testator has left his property to the other children, does Congress intend now to frustrate this effort at equality?

It may be suggested that the original claimants did not regard these claims as property, and never made their wills with reference to them, and that, now that they are unexpectedly paid, it may have seemed to Congress that justice would be better served by treating them as not considered by testators in making their wills.

But, aside from the unwarrantable assumption that it would be better to treat unthought-of assets as going by intestacy rather than by the residuary clause of a will, the idea that these claims were unthought-of is wholly wrong. No one familiar with the history of the agitation, continued ever since the treaty of 1800 was ratified, could make that mistake. The original sufferers were constantly stirred to a lively remembrance of their grievances by incessant memorials to Congress and to the state legislatures, by petitions, hearings, and public reports. Every one of the original thirteen states memorialized Congress on behalf of the claimants. Many a New England shipowner must have looked upon these claims as the one chance of repairing his broken fortunes, and left them in his will with the hope that Congress would be more just to his legatees than it had been to him.

When William Gray made his will in 1824 he undoubtedly had his claims against the government as much in mind as did his executors four years later, when they scheduled and valued them. (Record, p. 45.)

With this history Congress was very familiar, and it is inconceivable that it should have intentionally defeated the purpose of the testators, especially when it recognized their assignments made during life.

## XII.

There have been three recent amendments of the appropriation act of 1891, but we find little in any of them to throw light on the question here at issue.

By act 27 St. at Large, 674, the appropriation to William Mulligan, administrator of George Wattle, is amended by providing that —

"the award in this case shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representative on whose behalf the award is made represents the next of kin, or, in the event the court shall find there were no next of kin and that there is a widow, then that such widow is represented . . . to be paid to the person or persons entitled to recover and receive the same, to be ascertained by the court of claims upon sufficient evidence, and certified to the secretary of the treasury."

By act 28 St. at Large, 487, the same appropriation is still further amended by providing —

"that in the event the court shall find there were no next of kin and that there was a widow, then that said sum be paid to the executor, personal representative, or next of kin of such widow."

This is evidently the case of an intestate estate where the intestate was thought to have left no next of kin, and the money would therefore have no claimant. It was to give his widow the benefit of the payment that this special act was passed.

An amendment was also passed 28 St. at Large, 487, in the case of John A. Brimmer, administrator of John Gilliat, providing that the money be paid to the persons entitled to recover it, to be ascertained by the Court of Claims.

This amendment, as well as those before referred to, does seem to indicate that in cases of intestacy the next of kin are to be ascertained, according to the usual rule of law, at the death of the testator; but we cannot see that anything in either amendment has any bearing on a case where there was a will, except in so far as a reference of the case to the

court to ascertain the persons entitled is a recognition of the legal rules of ownership, since upon these rules the court must base its conclusions, unhampered by any limitations found in the proviso.

Since the act of 1891 was passed, two appropriation bills have been passed by the Senate providing for subsequent awards by the Court of Claims. (Pub. Doc. H.R. No. 9284, 52d Cong. 1st Sess.; No. 10,258, 52d Cong. 2d Sess.) Neither of these bills passed, because the House of Representatives refused to make any appropriation at all for that object. If it is proper to refer to these bills, we should like to point out that they are evidently designed to meet the doubts raised by the act of 1891. As it cannot be intended that one set of awards under the act of 1885 should be differently distributed from the others, these two bills are in effect declaratory of the act of 1891, which originated in the Senate.

Each of these bills contains a proviso in the following language, the italics indicating the new words not in the act of 1891, and now inserted: —

> "Provided, that, in all cases where the original sufferers were adjudicated bankrupts *or insolvents, or made voluntary assignments for the benefit of creditors*, [the] awards shall *hereafter* be made on behalf of the next of kin *or to those entitled under the wills of the original sufferers or the wills of those who take thereunder*, instead of *to voluntary assignees or* to assignees in bankruptcy, and the awards in the case of [the] individual claimants *herein appropriated for* shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represents [*sic*] the next of kin, *or legatees as aforesaid*, and the courts which

granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

This is certainly plain enough on the point now in question.

## XIII.

If legatees are to be excluded in favor of next of kin, the question has been raised whether the latter are to be determined as of the time of the death of the original owner, or as at the time of the passing of the act.

A further question might be raised, viz., whether the next of kin are to take *per stripes* or *per capita*, but it hardly seems to need much argument to show that the ordinary rule of representation in descent recognized in the common law, and probably in all statutes of distribution, is to be followed in the absence of any intimation of a different intention. It would seem to need a very explicit direction to put great-grandchildren each for each on the same plane with those of an earlier generation. There might also be a question in some cases whether by "next of kin" are meant blood relations, as is the common law interpretation (*Swazey* v. *Jaques*, 144 Mass. 135), or statutory next of kin. Neither this question nor that of representation is material in this case if the next of kin are determined, as we submit they must be, at the death of William Gray, Sen., since all his children survived him, and the next of kin are the same on either theory.

The act seems to us to recognize and adopt the statutory rules regulating the distribution of personal property as they may exist in the respective domiciles of the several owners, since the appointment of the representatives in the several probate courts, and the security which they have there given, are expressly referred to. The intention seems to have been

to leave everything to be worked out in the appropriate state courts, according to the established rules for the distribution of property there in force. Unless this is the case, the act entails endless trouble and confusion.

The question of determining the next of kin applies not merely to cases where, according to the contention of the next of kin, legatees are to be excluded, but applies to every case of intestacy, since "next of kin" must have one meaning, and one rule must govern all cases.

The question, therefore, is whether Congress intended to direct by this proviso that, in every case where the original owner died intestate, this particular piece of his property, instead of taking the same course as the rest of his estate, should be distributed only among such of his next of kin as were alive on a particular day.

That next of kin, and heirs, are to be ascertained as of the death of the ancestor, unless a contrary intention is declared in the instrument to be construed, is a general rule of law.

*Fargo* v. *Miller*, 150 Mass. 225, 229.
2 Williams on Exec. (Am. ed.) 400.

That the claims which the act of 1891 disposes of were the property of the original owner, within the strict rules of law, and descended to his statutory next of kin living at his death if he died intestate, we have maintained above in this brief. If we are correct in that position, there must be a clear direction in order to divert the payment from the owner of the obligation which is being paid. We fail to find any evidence whatever of an intent to vary the rules of ownership in any case where next of kin are to take. Our interpretation of the words "next of kin" is, as stated above, that they include all owners except assignees in bankruptcy. Whether we are right or wrong in that position, we can see

nothing in the proviso which even suggests that the words are to be narrowed down to mean only next of kin living on a special day, or hints at an intention to interfere not only wherever there is a will, but wherever there is none. Such an interference would be arbitrary and inexplicable. So far from this, the proviso especially recognizes the representative as appointed in the usual way by the probate court, as representing those whom he must represent by virtue of such an appointment, and as having given security to distribute the money in the usual way. It is obviously left to the court which created the trust to compel its performance according to its own rules and in the usual way.

We have argued above that the trust which an executor has in favor of legatees is not to be disturbed merely on account of an ambiguity in an incidental provision of a proviso. But there is not even an ambiguity to excuse a change in the trust of an administrator of an intestate estate. Had this been intended, the insertion of the single word "living" would have indicated it: as it is, nothing warrants it.

The only argument which can be made in favor of next of kin living at the time of the act must rest, so far as we know, on the idea that the appropriations were outright gratuities. Pushing this to its extreme point, it may be urged that the words "next of kin" have no reference to property, or to the estate or title of the original owner, or to the time of his death, because Congress is distributing a present bounty, wholly unconnected with obligation or ownership, and is therefore dealing with living persons, who are described, for identification, as "next of kin." On this theory all principles of descent, or distribution *per stirpes*, must be abandoned, and nothing would remain but to treat all individuals who come within the description as standing equal.

Whether this view is tenable, depends upon considerations which we have discussed earlier in this brief.

On the gratuity theory, and assuming that legatees are excluded, and everything thrown in together to the next of kin, it might be urged that Congress would hardly cut out legatees and still recognize next of kin who are also dead, since to do that would admit assignees in bankruptcy, creditors and legatees of such next of kin, and would be about as objectionable as recognizing the title of the original owners. This argument first assumes that an ambiguity in language requires the exclusion of legatees of the original owner, and then that, this exclusion being granted, there is involved an exclusion of still other owners, about which there is no suggestion of doubt in the act. To our mind, the argument works in the reverse order: there being no indication of an intention to exclude the legal next of kin in cases of intestacy, the act recognizes there the ownership of the claims. It can then hardly be that it means to exclude legatees of the original owners if it includes legatees, creditors, and assignees of these intermediate owners living at the death of the original owner, but now themselves deceased.

In fact, Congress never troubled itself, in our opinion, about creditors, wills, or assignments, either of original owners or next of kin, except in so far as it has declared itself in its exclusion of the assignees in bankruptcy of the original owners. Everything else is left to take its course with other assets, according to the trusts imposed upon the representatives by the courts which appointed them.

Certainly no principle of justice, or natural purpose to satisfy those who are asking for payment, can explain the exclusion of every owner who happened to die before a stated day. Many owners must have spent much time and effort in procuring recognition of these claims, and in estab-

lishing them in the probate court under the act of 1885. Is such an owner, whose representative has received a favorable judgment from the Court of Claims, to be deprived of his title, and his will ignored, if he happened to die before the appropriation act was finally signed?

It is to be noticed that two of the amendments of the act of 1891 which were referred to above, imply that the next of kin are to be ascertained at the death of the original owner. They provide that, "in the event the court shall find there *were* no next of kin," the widow is to be recognized, and, if she is dead, her personal representative or next of kin. This does not point to an inquiry whether there *are* next of kin, but evidently goes back to the death of first owner; and in giving the money as a part of the estate of the widow, her title also seems to be recognized as having accrued at the time of her husband's death. (27 St. at Large, 674; 28 St. at Large, 487.)

It is noticeable that even the courts which have treated the payments by Congress as gratuities, and for that reason have excluded the legatees of the original owner, have refused to go the full length and dissociate the money from all idea of property by giving it to the next of kin living at the date of the act, *per capita*. In the second decision of *Clement's Case*, 160 Penn. 361, the court, while repudiating the idea that the claim was a part of the estate of Jacob Clement, the original sufferer, decides that —

> "distribution in the present case, therefore, should be made to the next of kin of Jacob Clement living on March 3, 1891, to be ascertained by the law of Pennsylvania in the same manner as if the fund had been a part of the estate of said Jacob."

A similar decision appears to have been made in *Gardiner v. Clarke*, 20 Dist. Col. 261.

So, also, in the present case the justices in the court below who dissented from the conclusion of the court by which the legatees took, nevertheless held that the next of kin took as in the case of intestacy, *i.e.*, on the death of the original owner.

We submit that it would be quite illogical, in a case where the original sufferer left no will, to determine the next of kin on a basis of ownership, and yet refuse to recognize all title in intermediate owners if they left wills, nothing appearing either in the act or in the nature of the case to countenance so arbitrary a distinction. If this would be wrong in the case where the original sufferer was intestate, it must be equally wrong where he left a will, even though the act requires an exclusion of his legatees in favor of his next of kin, because the words "next of kin" can have but one meaning, and there can be but one rule for all cases.

## XIV.

The authorities on the question between legatees and next of kin are as follows: —

The Court of Claims has not passed directly on the question, but has considered the proviso in four cases:

In *Adams' Case*, 26 Ct. Cl. 249, it appeared that Brooks was an insurance broker, and individual underwriters subscribed in specified amounts through him. When a loss occurred it was Brooks' habit to pay it all, and take assignments from the several underwriters of their claims. Brooks having by these assignments become the proprietor of French spoliation claims, they were allowed to him under the act of 1885, and included in the appropriation act of 1891. Brooks'

representative now applies for a certificate in order to conform to the requirements of the proviso, and the court grants him one, speaking of the proviso as designed to keep out assignees, and remarking that the fear that the claims had been often assigned had proved to be unfounded, for, in fact, they had been retained in the families of the losers with uncommon tenacity, "still subject to distribution *as assets* of those who first made the loss."

In *Henry's Case*, 27 Ct. Cl. 142 (cited *supra*), the court held, as stated above, that the proviso had no reference to anything in the act of 1891, but meant only —

> "that in all future cases the court shall regard the administration of the original sufferer, representing the next of kin, as entitled to the amounts found due, instead of the assignee in bankruptcy, wherever the original sufferers were declared bankrupt."

This leaves all the awards paid by the act of 1891 to follow the rules of law as to ownership, and legatees must take where there is a will.

In *Durkee* v. *United States*, 28 Ct. Cl. 326, the original owner had died leaving no next of kin, and leaving a will in which his widow was sole legatee. His administrator, the only person authorized by the act of 1885 to apply to the court, failed to apply within the time allowed by the act, but the representative of the widow did apply, and the husband's administrator now asks to be substituted. This the court refused, saying (NOTT, J.), —

> "An administrator should not be allowed to come in who, having neglected to institute proceedings within the jurisdictional period, when he might have done so

> as a matter of right, does not now represent persons entitled to relief, — that is to say, the next of kin of the original sufferer."

It does not appear whether the husband's administrator had taken out letters as administrator with the will annexed, and therefore represented the widow, who was legatee, or simply as administrator of intestate assets. If the latter, he was rightly excluded, there being no next of kin for him to represent. If the former, it would seem that he had a sufficient standing as representing a legatee, though he was properly excluded in either case as being too late.

If this opinion can be thought to countenance the interpretation that an administrator with the will annexed does not represent legatees, and that they are excluded, it is corrected by a later case, *Hooper's Case*, 28 Ct. Cl. 480 (cited *supra*). Here an administrator with the will annexed had been appointed at the instance of the residuary legatee, the next of kin, however, having notice of the appointment. The court granted the certificate, holding (DAVIS, J.) that —

> "The certificate . . . does not determine the rights of beneficiaries, nor whether legatees can take to the exclusion of next of kin, or next of kin to the exclusion of legatees, but merely that next of kin are in existence, and that the administrator who receives the money was appointed on the application or with the knowledge or acquiescence of the next of kin, and so far represents them that they will be able in the proper jurisdiction to enforce their rights against the funds in his hands. The purpose of the statute was to prevent the payment of money to an administrator who in fact represents nobody, or who may represent only creditors or assignees in bankruptcy."

This gives an interpretation which leaves ownership to be settled by the ordinary rules in the probate court, and is in effect a decision that next of kin are always represented by an executor, though the act requires that they be notified so as to protect their interests, if they have any which can be established in the court where the executor is accountable.

In the state courts there are the two Massachusetts cases, *Balch* v. *Blagge*, *ubi supra*, and the present case, both holding that the money is a part of the estate of the original owner. In *Clement's Case*, the Pennsylvania court first took that view (150 Penn. 85), and then, after a change in the membership of the court, adopted the gratuity theory and reversed its own opinion (160 Penn. 391). That the court in the second case has not answered its own arguments in the first we submit on the two opinions.

In *Leffingwell's Case*, *ubi supra*, the Connecticut court held that the money passed by will. In *Gardiner* v. *Clarke*, *ubi supra*, the Supreme Court of the District of Columbia, and in *Corey* v. *Morris*, 49 Leg. Intel. 141, the Circuit Court of Baltimore city, held that the money did not pass by will.

As we have pointed out above, the decision in each case except the last is on one side or the other according as the court treats the appropriations as the payment of an obligation or as the bestowal of a gratuity. In the last case the language of the proviso is considered so clear as to control without inquiry into intention.

## The Assignment of Henry Gray.

The administrator of Henry Gray has alleged, in his assignments of error (Record, p. 34) that the court below erred in holding that the assignment made by Henry Gray precluded him from sharing in the distribution of the fund here in controversy. This complaint is based, as we understand it, on the ground that the assignment was invalid under the laws of the United States, it being also alleged that the existence of a mistake as to the value of the claims on European governments operates in some manner to defeat the assignment.

On July 21, 1829, Henry Gray, one of the sons and executors of William Gray, Sen., executed an assignment to his four brothers, which is set out in the record (p. 21). The instrument acknowledges that Henry Gray is indebted to his brothers, who were his co-executors, in the sum of $189,-368.42; recites that there are certain assets of the estate still uncollected, including "certain claims and demands on our own and other governments still unsettled," which are described in six schedules annexed to the instrument, and valued in these schedules for the purposes of settlement at $155,000, of which Henry Gray's portion would be $31,000. Henry Gray then assigns to his four brothers, in satisfaction of his debt, all his interest in the property mentioned in the schedules "to which I am or may become in any way entitled as one of the residuary legatees or one of the executors of said William Gray, or in any manner by or through him;" and he releases his co-executors from all accountability for the property or its proceeds, and covenants to make further assurances to carry out the true intent of the instrument. The four brothers join in giving Henry Gray a full release of his debt. The six schedules are set out in the record (pp. 39–46), one of them, schedule G (p. 45), being "A Summary of Claims on European Governments for Spoliations

on Property owned and insured by William Gray from 1796–1811;" and on this schedule the first item is, —

"Am't claims on France prior to 1800, list, $260,500.".

It is not disputed that this assignment purported to cover the French claims which were subsequently paid by Congress.

The administrator and descendants of Henry Gray now dispute the validity of the assignment on the ground that it is obnoxious to the act of Congress prohibiting the assignment of claims against the government. (U.S. Rev. St. sec. 3477.) This objection seems clearly untenable, first, because the assignment was made in 1829, while the act was not passed until 1853; and second, because it is well settled that the act does not affect the title to such claims as between parties, being designed only for the protection of the United States treasury.

*Goodman* v. *Niblack*, 102 U.S. 556.
*Bailey* v. *United States*, 109 U.S. 432.
*Hobbs* v. *McLean*, 117 U.S. 567.
*Freedman's &c. Co.* v. *Shepherd*, 127 U.S. 494.

Certainly there seems no room for objection under the act after the money has been actually paid by the government.

*Jernegan* v. *Osborn*, 155 Mass. 207.

The assignment was also attacked in the court below on grounds of fact growing out of an alleged mistake in the value which was put upon the claims for the purposes of settlement. The issues of fact were found adversely to the administrator of Henry Gray by the single justice who tried the case (p. 36), and the assignment was sustained by him

and by the full court (p. 68). We do not understand that these questions of fact can be reviewed here.

We see nothing remaining of the nature of a federal question concerning the assignment, except the question whether the administrator of Henry Gray received any interest, under the appropriation act of 1891, in the fund now in the hands of the administrator with the will annexed of William Gray, Sen.

If the administrator of Henry Gray took any interest, whether it came to him by virtue of the will of William Gray or as one of his next of kin, or in whatever way, it passed by the assignment. Such was the decision of the court below, not on federal grounds but on grounds of general law, concurred in even by the two justices who dissented on the question of the interpretation of the act of 1891. We submit, therefore, that there is nothing of the nature of a federal question concerning the effect of the assignment upon property owned by the estate of Henry Gray which can be reviewed here.

*Murdock* v. *City of Memphis*, 20 Wall. 590, 636.
*Hale* v. *Akers*, 132 U.S. 554.

But if the question were open here, the conclusion reached by the court below would be inevitable.

If Henry Gray took any title to the claims under his father's will, as we maintain he did, that title clearly passed by the assignment. If the act of 1891 disregarded any such title, and treated the estate of William Gray as intestate, recognizing only next of kin, still Henry Gray, as such next of kin, would be claiming "by or through" his father, and the assignment would equally apply. Even if the act of 1891 repudiated all idea of title or descent, and gave an

interest in the money to Henry Gray's estate as a mere gratuity, that interest would still be covered by the assignment, since it undertook to cover the specific thing, however obtained.

*Kingsbury* v. *Burrill*, 151 Mass. 199.
*Jernegan* v. *Osborn*, 155 Mass. 207.

Henry Gray expressly released the executors of William Gray, Sen., "from all obligation and accountability to me for the said property and proceeds thereof." How could Henry Gray's representative now call the successor of those executors to account for the proceeds of the specified claims which he has collected?

The only construction of the act of 1891 which could deprive the assignees under this assignment of a share corresponding to Henry Gray's proportion, either as legatee or next of kin of his father, is a construction which would cut off Henry Gray's administrator from all interest in the fund, and give it as a present gift direct to his ten children. If the administrator got nothing, then there is nothing to pass by the assignment: if he got anything, on whatever theory, it must pass.

Whether the ten children of Henry Gray are entitled to a share of the fund to the entire exclusion of their father's representative, must depend on the considerations which have been discussed above in this brief.

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